



MAR 20 '61

BOOK 11

Abstract

General number 9330.

Agenda number 7.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

MAY TERM A.D. 1942

LOUIS BALTISBERGER,
Plaintiff-Appellee,

APPEAL FROM THE CIRCUIT COURT
OF CALHOUN COUNTY.

-vs-

FREDERICK WEISHAAR and JOSEPH
WEISHAAR, Executors of the
Estate of Joseph Weishaar,
deceased,

HONORABLE MAURICE E. BARNES,

Defendants-Appellants.

Judge Presiding.

HAYES, P. J. :

31 I.A. 2

A Claim was allowed in the County Court of Calhoun County in favor of appellee (hereinafter called plaintiff) against the estate of Joseph Weishaar, deceased. An appeal from this judgment was taken to the Circuit Court of Calhoun County where the claim was allowed in the sum of two thousand five hundred and ninety-five dollars and thirty-six cents (\$2,595.36) and judgment entered thereon.

The claim was based upon a promissory note dated April 29, 1933, for thirty one hundred (\$3100.00) dollars, due one year after date, payable to Louis Baltisberger, signed by Joseph Weishaar in his lifetime, and four other signers as co-makers. The signers of the note were all directors of the Bank of Brussels. It appears from the evidence that the Bank was having difficulty in obtaining permission to open after the bank moratorium of 1933; that in order to obtain cash with which to re-open five of the directors, including the decedent Joseph Weishaar, made and executed the note in question.

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The cashier P. M. Zingrang, one of the co-makers, secured the signatures of the other four and delivered the note to plaintiff in exchange for thirty one hundred dollars in Liberty Bonds. These bonds were used to open the bank. Certain notes of the bank which had evidently been taken out of the assets of the bank were placed with Mr. Zingrang as security for the benefit of the makers of the note and from the collection of these securities one thousand dollars was paid upon the note on April 18, 1938, and the interest was paid to April 29, 1938. Neither in the County Court nor until the close of evidence in the trial in the Circuit Court was there a denial of the execution of the note filed. At the conclusion of all the evidence in the Circuit Court, the defendants asked leave to file amended objections which denied that Joseph Weishaar, during his lifetime, executed said note for the consideration mentioned therein.

The principal ground urged for reversal is that there is no competent evidence to establish the execution of the note, and that the witness P. M. Zingrang who testified to the execution and delivery of the note was incompetent on account of being a joint maker, and interested, and that the statute prohibited a person in interest from testifying where the adverse party defends as administrator.

It appears from the record in this case that Zingrang, who was Cashier of the Brussels Bank, had taken the note in question to the various directors and had had them sign it. Under his testimony, which was not contradicted, the execution of the note was clearly established, leaving the only question of whether or not he was a competent witness. Under section two of the Evidence Act, Chapter 51, the prohibition is against a party to the suit

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or a person directly interested in the event thereof. Zingrang cannot be said to be directly interested in the outcome of this particular suit. His liability, by reason of being a signer on a note, is not changed in the slightest degree by this particular suit. He does not testify on his own motion nor in his own behalf but rather to the valid execution of the note in question. It would be more favorable to him in relieving him of liability if it turned out that the note was not a genuine or a valid note. His testimony, in effect, is against his own interest and does not, in our judgment, come within the prohibition set out in the statute.

In the case of *Sconce v. Henderson, et al.*, 102 Ill. 376, it was held that the principal of a promissory note is a competent witness in a suit brought on said note against the surety, for he is not a party to the suit and his interest, whatever it might be, is equally balanced, no matter in whose favor the suit might terminate, as he is and would ultimately be liable for the whole sum due on the note.

The fact that the execution of the note was not denied in the Probate Court nor in the Circuit Court, until after the evidence was closed,--and then the denial was not certain and definite but conditional--and no evidence offered by the defendant showed that the signature of Joseph Weishaar was not genuine, forces us to conclude that the testimony of Mr. Zingrang was the truth and the note was made, executed and delivered in consideration of the thirty one hundred dollars worth of Liberty Bonds of the plaintiff, and that the Circuit Court properly allowed the claim. The defendant's suggestion, in their brief, that attorney's fees were included in the amount of the judgment is not warranted for a computation

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of the unpaid principal with the interest from the date of the last payment of interest to the date of judgment shows clearly that no sum was allowed for attorney's fees.

For the reasons herein set out the allowance of the claim of the Circuit Court of Calhoun County was correct, also the judgment entered thereon and the judgment is hereby affirmed.

JUDGMENT AFFIRMED.

TO THE COMMISSIONER OF THE LAND OFFICE, ALBANY, N. Y.
 I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the application of the State of New York for a lease of land in the State of New York.

For the reasons therein set out, the application of the State of New York for a lease of land in the State of New York is hereby denied.

Very respectfully,
 J. B. ALLEN, COMMISSIONER.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

MAY
February Term, A. D., 1942.

General No. 9326.

Agenda No. 5.

MILFORD KELLENBERGER,
Plaintiff Appellee,)

-vs-

HELEN HARTMAN MITCHELL, as
Administratrix of the Estate
of Everett E. Mitchell,
Deceased,)
Defendant Appellant.)

Appeal from
Circuit Court,
Montgomery County.

RIESS, J.:

316 I.A. 112²

The plaintiff appellee, Milford Kellenberger, filed suit against the defendant appellant, Helen Hartman Mitchell, as Administratrix of the Estate of Everett E. Mitchell, deceased, in the Circuit Court of Montgomery County to recover damages for personal injuries arising out of an automobile collision. The case was tried by a jury which returned a verdict in the sum of two thousand dollars against the defendant, after motions for a directed verdict for the defendant had been denied both at the close of plaintiff's evidence and all of the evidence. Motions for judgment in favor of the defendant notwithstanding the verdict and for new trial were also made and denied, and judgment was rendered against the defendant on the verdict on August 18, 1941, from which this appeal was perfected.

The complaint charged that the collision between the car of the plaintiff and that of defendant's intestate, Everett E. Mitchell, occurred at about 12:30 P. M. on October 4, 1940, at a point on State Route No. 48 about one mile east of U. S. Route No. 66 in Montgomery

STATE OF ILLINOIS
CIRCUIT COURT
THIRD JUDICIAL DISTRICT

MAILED
RECEIVED
JANUARY 10, 1941

Case No. 2382

Plaintiff
Defendant

Plaintiff
Defendant

Page 1

The plaintiff, Edward J. Schaefer, filed suit against the defendant, Edward J. Schaefer, in the Circuit Court of the State of Illinois, in the County of Cook, to recover damages for personal injuries arising out of an automobile collision. The suit was filed by a party who assumed a verdict in the sum of two thousand dollars against the defendant, after receiving for a directed verdict for the defendant had been denied both at the close of plaintiff's evidence and all of the evidence. Judgment for judgment in favor of the defendant notwithstanding the verdict and for new trial was also made and denied, and judgment was rendered against the defendant on the verdict on August 10, 1941, from which this appeal was taken.

The complaint charges that the collision between the car of the plaintiff and that of defendant's interest, Edward J. Schaefer, occurred at about 10:30 P. M. on October 4, 1940, at a point in State Route No. 45 about one mile east of U. S. Route No. 88 in Cook County.

County, Illinois. The complaint further charges and it appeared from the evidence that the deceased, Everett E. Mitchell, was the owner of and was driving a Buick automobile in an easterly direction along State Route No. 48; that he undertook to pass around a truck which was proceeding eastwardly ahead of him, and at a point near the rear of the truck, ran into and collided with the car of the plaintiff, who was proceeding westwardly in a Nash automobile, and thereby seriously injured the plaintiff.

Numerous allegations of negligence on the part of the defendant are set forth, including failure to keep a lookout for west bound traffic; failure to maintain sufficient brakes; to sound his horn or give warning signal that he was about to turn his vehicle from a direct course, contrary to statute cited; in driving at a speed greater than was reasonable and proper, having regard for the traffic and use of the way; in failing to turn to the right of the center of such highway so as to pass without interference; in driving to the left of the center of the road on and against plaintiff's car, while the same was proceeding on the right or proper side of the highway; in negligently attempting to overtake and pass another vehicle proceeding ahead of the Mitchell car in violation of the statute, from which alleged negligence the collision and injury to plaintiff proximately resulted while the plaintiff was in the exercise of due care and caution for his own safety. Defendant denied due care on the part of the plaintiff and of any negligence on the part of the defendant.

Defendant assigns error in the refusal of the Court to grant motions for directed verdict in favor of the defendant at the close of plaintiff's evidence and of all the evidence; in denying defendant's motions for judgment notwithstanding the verdict and for new trial and in entering judgment on the verdict, and contended that there was no evidence tending to prove the exercise of due care and caution or lack

County, Illinois. The complaint further charges and it appeared from the evidence that the deceased, Thelma E. Mitchell, was the owner of and was driving a Buick automobile in an easterly direction along State Route No. 48; that he attempted to pass around a truck which was proceeding westerly ahead of him, and at a point near the rear of the truck, the same collided with the car of the plaintiff, who was proceeding westerly in a Buick automobile, and thereby seriously injured the plaintiff.

Relevant allegations of negligence on the part of the defendant are set forth, including failure to keep a lookout for west bound traffic; failure to maintain sufficient brakes; to sound his horn or give warning signal that he was about to turn his vehicle from a direct course, contrary to statute cited; in driving at a speed greater than was reasonable and proper, having regard for the traffic and use of the way; in failing to turn to the right of the center of such highway as he so pass without interference; in driving to the left of the center of the road on the against plaintiff's car, while the same was proceeding on the left or proper side of the highway; in negligently attempting to overtake and pass another vehicle proceeding ahead of the Mitchell car in violation of the statute, from which alleged negligence the collision and injury to plaintiff proximately resulted while the plaintiff was in the exercise of due care and caution for his own safety. Defendant denied any error on the part of the plaintiff and of any negligence on the part of the defendant.

Defendant assigns error in the refusal of the Court to grant motions for directed verdict in favor of the defendant at the close of plaintiff's evidence and of all the evidence; in denying defendant's motions for judgment notwithstanding the verdict and for new trial and in entering judgment on the verdict, and contended that there was no evidence tending to prove the exercise of due care and caution on the

of contributory negligence by the plaintiff. Aside from the refusal to give instructions directing verdict for the defendant, no error is assigned in the giving or refusal of any of the instructions. The case is argued by the defendant upon the theory that there is no proof in the record tending to show that the plaintiff was in the exercise of due care and caution for his own safety.

Briefly recited, the evidence of one of plaintiff's witnesses, Helen Gross, was that she was driving in her own car at a speed of between thirty five and forty miles per hour along the highway approximately one fourth to one half mile to the rear of the Mitchell car at the time of the collision; that the car driven by Mitchell^{had} passed her at a speed of about ten to fifteen miles faster than she was driving and continued westward ahead of her car in the right traffic lane until it reached the rear of a truck going in the same direction, when the Mitchell car drove to the left without hesitating, to go around the truck; that the Kellenberger car was approaching from the opposite direction along the north side of the slab, which she first saw when the Mitchell car collided with it at a point near the rear end of the truck, the collision being on the side of the highway from which the Kellenberger car was approaching; that after the collision, the Kellenberger car was headed half way around and at an angle, being partly on and partly off of the highway and the Mitchell car was entirely off of the highway; that there was a light rain at the time of the collision. Photographs of the point of collision and condition of the cars were admitted in evidence.

It is undisputed that in this collision, plaintiff was severely injured and Mitchell was killed and the defendant appointed Administratrix of his estate. The evidence further showed that as a result of the collision, the plaintiff sustained a fracture of the skull, an injury to the sensory nerve from a cut above his eye, cuts on his arms and legs, torn ligaments of his leg and injuries to his

of conspiracy, negligence by the principal. While from the material to give instructions appearing verbatim for the defendant, no error is indicated in the giving of counsel or any of the instructions. The case is argued by the defendant upon the theory that there is no fault in the record tending to show that the principal was in the control of the case and control for his own safety.

Chiefly, the evidence of one of the principal's witnesses, Helen Brown, was taken and was driving in her own car at a speed of between thirty-five and forty miles per hour along the highway, approximately the time of the collision, that she was driven by Mitchell, and that at a speed of about ten to fifteen miles per hour when she was driving and continued forward ahead of her car in the right-hand lane until it reached the rear of a truck going in the same direction, when the Mitchell car drove to the left without hesitating, to go around the truck; that the defendant was not approaching from the opposite direction along the north side of the highway, when she first saw the Mitchell car colliding with it at a point near the rear end of the truck, the collision being on the left of the highway, and when the defendant was not hesitating; that when the collision, the defendant was headed back and forward out of an angle, being partly on and partly off of the highway and the Mitchell car was entirely off of the highway; that there was a light rain at the time of the collision. Photographs of the point of collision and condition of the cars were admitted in evidence.

It is suggested that in this collision, Mitchell was severely injured and Mitchell was killed and the defendant was not injured. The evidence further shows that as a result of the collision, the plaintiff sustained a fracture of the skull, an injury to the coronary artery from a car moving at 40, and on his arms and legs, torn ligaments of his leg and injuries to the

ankle and other injuries for which he was treated; first in the hospital and then at his home for six weeks and ^{that he} was obliged to go on crutches for a time thereafter. He was unable to work for more than two months and became liable to pay considerable sums for hospital and physicians' bills and X-rays and ^{sustained} loss of wages while undergoing treatment for his injuries.

From a careful reading of the briefs, abstracts and an examination of the record herein, it appears to this Court that both the question of due care and want of contributory negligence on the part of the plaintiff and that of negligence on the part of the deceased became questions of fact peculiarly within the province of the jury to pass upon under the facts and circumstances in evidence and legitimate inferences therefrom.

It is a settled rule of law of this State that upon a motion for a directed verdict, a question of law is first presented as to whether, when all of the evidence is considered together with all reasonable inferences therefrom in its aspect most favorable to the party against whom the motion is directed, there is a total failure to prove one or more of the necessary elements of the case. Foreman-State Trust & Savings Bank v. Demeter, 347 Ill. 72, 179 N. E. 465. The Trial Court is not permitted to direct a verdict where there is any evidence fairly tending to prove the allegations of plaintiff's complaint, and this rule applies in passing upon the question of whether the plaintiff was in the exercise of due care and caution for his own safety at and immediately before the injury. Blumb v. Getz, 366 Ill. 273, 8 N.E. (2d) 620; Reidel v. Camp, 311 Ill. App. 656, 37 N. E. (2d) 579; Wedig v. Kroger Grocery & Baking Co., 282 Ill. App. 370; Selman v. Midwest Haulers, 309 Ill. App. 154, 33 N.E.(2d) 140.

In the case of Ziraldo v. Lynch Co., 365 Ill. 197, 6 N.E. (2d) 125, it is said: "Whether a plaintiff was guilty of contributory

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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It is a matter of fact that the only person who has been in contact with the subject of this report is the person who has been in contact with the subject of this report. The person who has been in contact with the subject of this report is the person who has been in contact with the subject of this report.

111. 404. 870; *Salmon v. Western Union*, 308 Ill. App. 1st 32 (1911).

185, it is said: "between a liability and liability of compensation".

negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 id. 630; O'Rourke v. Sproul, 241 id. 576.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 id. 614.) We cannot weigh the evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence, (Dukeman v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 237 Ill. 104,) and we cannot reject testimony as improbable unless it is contrary to some natural law. Zetsche v. Chicago, Peoria and St. Louis Railway Co., 238 Ill. 240."

As a general rule, both negligence and contributory negligence are questions of fact for the jury, and when there is any evidence before the Court tending to prove such issues and the determination of the question involves the weighing and consideration of evidence, the question is submitted as a question of fact to the jury.

The only eye witness who testified was Helen Gross. Neither the driver of the truck nor the plaintiff were occurrence witnesses, and no other person was present at or immediately before the time of the collision. At the time of plaintiff's injuries, it appears that he was driving his car in a westerly direction on the north side of the highway to the right of the center line, where the law required him to be. Mitchell, from the evidence, was driving at a rate of speed ten to fifteen miles faster than the witness, Helen Gross, whose car was proceeding at a speed of thirty five to forty miles

per hour, and it appeared to continue at this rate until it advanced to a point at the rear of the truck, when it swung out across the line in an apparent effort to also pass the truck, and struck the plaintiff's car head-on near the rear of the truck and in the lane of traffic from which plaintiff Kellenberger was approaching.

Under these circumstances, there was evidence tending to prove that the plaintiff was in the exercise of due care and caution for his own safety and was driving within his traffic lane in a lawful manner and that the deceased negligently turned across from the rear of the truck where he could not be seen by the plaintiff until his car had come out on to the slab and struck the plaintiff's car in a head-on collision on the left side and across the black line of the slab in the direction that the Mitchell car was travelling. Under these circumstances, we hold that the facts and circumstances were such as to make it a question of fact whether or not the plaintiff was in the exercise of due care and whether or not Mitchell was guilty of negligence which proximately caused the collision and resultant injuries and damages as charged in the complaint.

The Court was amply justified under the evidence and reasonable inferences therefrom viewed in the light most favorable to the plaintiff in denying defendant's motion for a directed verdict. We further find that the verdict was not contrary to the manifest weight of the evidence on either the issue of negligence by the defendant or want of due care by the plaintiff. In denying defendant's motion for judgment notwithstanding the verdict and the motion to set aside the verdict and grant a new trial, the Trial Court committed no error. No point is made nor could the contention be successfully made that the amount of the verdict is excessive in view of the grave injuries sustained by the plaintiff.

Finding no reversible error in the record, the judgment of the Circuit Court of Montgomery ^{County} is affirmed.

JUDGMENT AFFIRMED.

OK
S.D.

Abstract

316 I.A. 113'

Gen. No. 9789.

Agenda No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1942.

982
1232

DONALD M. EATON, President, H. R. STANTON, Secretary, WILLIAM MAPES, J. E. GUSTAFSON, J. B. BARBER, ROBERT KAUFMAN, THOMAS SCHAP, constituting the Board of Education of Stockton High School District No. 50, Jo Daviess County, Illinois.

Petitioners-Appellants.

vs.

CHARLES T. LAMB, President, ARTHUR R. PRASSE, WIARD AUKES, and THOMAS R. PFISTERER, Secretary, constituting the Board of Education of the Non-High School District of Stephenson County, Illinois,

Respondents-Appellees.

Appeal from
Circuit Court,
Stephenson County.

WOLFE,-- J.

The members of the Board of Education of Stockton High School District No. 50, in Jo Daviess County, Illinois, filed a petition in the Circuit Court of Stephenson County for a writ

3161A.113

Gen. No. 13.

Gen. No. 13.

IN THE

ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1902.

ROBERT W. LIND, Plaintiff, vs. ROBERT W. LIND, Defendant, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -
J. R. LIND, Secretary, et al. -

Plaintiff-Appellee.

vs.

CHARLES T. LIND, President, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -
FRANK W. LIND, et al. -

Defendants-Appellants.

NOTE -- 1.

The members of the Board of Education of the
High School District No. 30, in the County of Cook, Illinois, filed
a petition in the Circuit Court of Cook County for a writ

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of mandamus against the individual members and Board of Education of Non-High School District of Stephenson County, Illinois. The petition alleged that ten pupils from the Non-High School District of Stephenson County attended the High School of Petitioners in Jo Daviess County; that there was due from the respondents to the petitioners as tuition for said students, the sum of \$1,192.20; that the respondents paid the petitioners the sum of \$1,016.14, leaving a balance due of \$175.80; that the respondents refused to pay the petitioners the same; that the petitioners asked the Court for a writ of mandamus to enforce said payment. To the original petition, the respondents filed a motion to dismiss, which was sustained in part and overruled in part. The petitioners then filed an amended petition, and a motion to dismiss was likewise sustained in part and overruled in part. The petitioners were again given leave to amend their petition and supplemental petition, and a motion to dismiss was likewise filed by the respondents. The Court sustained the motion and dismissed the petition. The petitioners elected to stand by their second amended petition. It is from this order and judgment that the appeal is prosecuted.

In the case of The People ex rel. Ethel Shippey Rude, Admx., Appellant, vs. The County of LaSalle et al. Appellees, 378 Ill., Page 573. Our Supreme Court discussed the rule relative to mandamus

of mandamus against the individual members and Board of Education

of Non-Right School District of Stephenson County, Illinois. The

petition alleged that the Board of Education had been illegally

of Stephenson County attended the High School of Stephenson in the

Davies County; that there was due from the respondents to the

petitioners as follows: for said students, the sum of \$1,192.20; for

the respondents paid the petitioners the sum of \$1,010.14, leaving a

balance due of \$182.06; that the respondents refused to pay the

petitioners the sum; that the petitioners asked the Court for a writ

of mandamus to enforce said payment. To the original petition, the

respondents filed a motion to dismiss, which was sustained in part and

overruled in part. The petitioners then filed an amended petition, and

a motion to dismiss was likewise sustained in part and overruled in

part. The petitioners were again given leave to amend their petition

and supplemental petition, and a motion to dismiss was likewise filed

by the respondents. The Court sustained the motion and dismissed the

petition. The petitioners elected to stand by their second amended

petition. It is now the order and judgment that the appeal is

reversed.

In the case of The People ex rel. Ethel S. May, et al.,

Appellants, vs. The County of Laclede ex rel. Appellees, The Ill.

Supreme Court. Laclede County, Illinois. The case relative to mandamus

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suits. In this case the facts were stipulated that if the plaintiff was entitled to recover, that there was due from the County of LaSalle to the petitioner the sum of \$821.25, and if the action survived the death of the pensioner, then the writ of mandamus should issue. In discussing the case the Court used this language: "The appellants claim that the parties have stipulated that mandamus is the proper procedure in this case and the appellees, by their briefs, fail to dispute the propriety of the mandamus proceedings. Certain fundamental rights cannot be so easily waived and stipulated away. We would be giving tacit approval to the practice pursued here, if we did not point out that this is not a proper case for an action by mandamus.

"Mandamus lies to compel the performance of a statutory duty only when the right to it is clear and indisputable. One seeking a writ of mandamus must establish a clear legal right to the writ. (People v. Getzendaner, 137 Ill. 234.) Mandamus will not lie for the collection of debts, but is proper to enforce payment of a claim ascertained to be due. This ascertainment is usually by a judgment. (People vs. Reddick, 181 Ill. 334.) Mandamus is not proper where the right of the petitioner must first be established or the duty of the officers sought to be coerced must first be determined. Hooper v. Snow, 325 Ill. 53; People v. Dixon, 346 id. 454."

In the present case it is disputed whether the respondents

cases. In this case the facts were stipulated that if the plaintiff was entitled to recover, that there was due from the County of Shelby to the petitioner the sum of \$201.15, and if the action involved the death of the petitioner, then the writ of mandamus should issue. In discussing the case the Court used this language: "The appellants claim that the writs have stipulated that an error in the proper procedure in this case has been apologized, by their friends, both to dispute the propriety of the mandamus proceedings. Certainly mandamus rights cannot be so easily waived and stipulated away. We would be giving tacit approval to the practice of doing more, if we did not put out that this is not a proper case for an action by mandamus."

"Mandamus lies to compel the performance of a statutory duty only when the duty to do is clear and indisputable. One seeking a writ of mandamus must establish a clear legal right to the writ. (People v. Detweiler, 155 Ill. 221.) Mandamus will not lie for the collection of taxes, but is proper to enforce payment of a claim ascertained to be due. (This ascertainment is usually by a judgment. (People ex. rel. v. Board of Education, 111 Ill. 534.) Mandamus is not proper where the right of the petitioner must first be established on the facts of the officers sought to be forced must first be determined. (People v. Know, 325 Ill. 57; People v. Board of Education, 315 Ill. 401.)"

In the present case it is disputed whether the respondents

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owe the petitioners anything, so there is no judgment or ascertained claim that is due. Until there is a judgment, or a definite ascertained undisputed claim, the action of mandamus will not lie.

The Judgment of the Trial Court is hereby affirmed.

Affirmed.

owe the petitioners anything, as there is no judgment or ascertainment
claim that is due. Until there is a judgment, or a definite ascertainment
of undistributed claim, the action of petitioners will not lie.
The judgment of the trial court is hereby affirmed.

Witness my hand and seal of office at the City of New York, this 10th day of June, 1908.

Abstract

316 I.A. 113²

Gen. No. 9797.

Agenda No. 19.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1942.

MARY E. SCHULTZ,
(Plaintiff) Appellee,)
vs.)
REUBEN SCHULTZ,)
(Defendant) Appellant.)

Appeal from
Circuit Court,
Du Page County.

WOLFE,-- J.

On October 28, 1941, the appellee, Mary E. Schultz, filed her suit for a divorce in the Circuit Court of Du Page County, against Reuben Schultz, the appellant. Reuben Schultz filed an answer to the divorce proceedings. By stipulation the case was heard as of default, and the defendant did not put in any evidence at the trial, except as to the amount of alimony that he was able to pay to his wife. The Court found the issues in favor of the plaintiff, and that she was entitled to a decree of divorce and

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permanent alimony, also attorney's fees and expenses incurred by her in the prosecution of her suit. The Court entered a decree of divorce and ordered the defendant to pay the costs of the suit, which amounted to \$29.00, and fifty dollars to plaintiff for her attorney's fees and \$42.50 per month as permanent alimony.

The decree was entered December 29, 1941. January 16, 1942, a notice was served upon the defendant to show cause why he should not be held in contempt of Court for failure to pay alimony etc., as provided in the decree of the Court entered December 29, 1941. Reuben Schultz filed an answer and a motion to set aside and vacate that part of the decree in which he was ordered to pay the costs of the suit and permanent alimony. Evidence was heard, and the Court overruled his motion to set aside, or vacate that part of the decree. It is from this order that the appeal is prosecuted.

It is contended by the appellant that the decree ordering him to pay the costs of the suit and \$42.50 per month for the support of his former wife is unreasonable and oppressive, and that he cannot comply with the order. He does not contend that his wife was not entitled to the divorce, but merely questions the amount the Court ordered him to pay. Considering the annual income of the defendant, \$2,200.00 (plus) as shown by the record, it seems to us that the Court's order for the defendant to pay \$42.50 per month, as alimony to his former wife, is not unreasonable.

3.

It is claimed by appellant that the Court erred in refusing to admit in evidence and consider the agreement entered into between Reuben Schultz and Mary E. Schultz relative to the settlement of their property, and the amount per month that Reuben Schultz should pay Mary E. Schultz for her support and maintenance. The second paragraph of this agreement recites that Reuben Schultz has refused to live and cohabit with Mary E. Schultz, his wife. The agreement designates the personal property Mrs. Schultz shall take and that Reuben Schultz shall pay her the sum of \$30.00 per month. The limit of this agreement is one year, and was dated September 6, 1940. The suit for a divorce was started on October 28, 1941. We think the Court properly held that this agreement was not admissible in evidence and it was immaterial, and in no way binding upon the Court in fixing the alimony for Mrs. Schultz.

The order appealed from is hereby affirmed.

Affirmed.

Abstract

AGENDA NO. 9

This is a petition for writ of certiorari, brought by appellees in the circuit court of Peoria county, to bring before said court the record of the Board of Fire and Police Commissioners of said city pertaining to certain alleged charges against appellees, the hearing thereon, and its order of their discharge as members of the fire department. Writ issued pursuant to the petition. The respondent appellants filed motion to quash the writ, and to dismiss the petition. Appellee petitioners filed their motion to quash the record. The court granted the motion of appellee petitioners, and entered judgment quashing the proceedings of appellant board, ordering that the record be held for naught. Appellants have prosecuted this appeal from such order and judgment of the circuit court.

Appellees were members of the fire department of said city. It appears that during a mayoralty campaign, certain trade unions endorsed one of the candidates. One of such trade unions was designated as, Fire Fighters Union No. 544, to which appellees belonged. Thereafter, appellees received notice by letter that they were dropped as members of the Peoria Fire Department, and advising them that charges had been preferred against them for political activity.

The record discloses that the Peoria Trades and Labor Assembly, by newspaper articles and advertising, endorsed a candidate for mayor of said city; and that Local No. 544 was affiliated with the general organization designated as the Peoria Trades and Labor Assembly. However, nothing appears to show that appellees held any office in the Trades and Labor Assembly, or had anything to do with such newspaper advertising, or took any active part in the mayoralty campaign.

The rules and regulations of the Board of Fire and Police Commissioners governing removal of members of the force, relative to charges made against said members, provides that the same shall be in writing and sworn to by the person or persons making such charges, together with the names of witnesses and other information to be used in the prosecution, which shall accompany the statement setting forth the charges. It is further provided that when any such charges are filed, the accused party shall be notified by the board, advised of the time and place of his hearing, and that he shall have not less than ten days for the preparation of his defense. No charges appear to have been filed against appellees in the manner provided by the rules and regulations. They received a letter from the board advising

them they had been dropped as members of the fire department, and further advising them that charges had been preferred against them for political activity. When they appeared before the board to request a copy of the written charges filed against them, they were advised that such charges would be preferred. It appears the board at this time proceeded to take evidence and make the record. Appellees were thereafter advised by letter that pursuant to such evidence, they had been found guilty of the charges preferred against them, and that the original order of discharge was final.

The trial court had the record of the proceedings of the board before it, and found that the return of the respondent appellants was insufficient in law to sustain a defense against the petition; that no charges in writing were made to show any dereliction or neglect of duty, or incapacity of appellees to perform their duties as members of the fire department, or any delinquency affecting their general character and fitness for the positions they held. The court properly quashed the proceedings of the board.

The order and judgment of the trial court is affirmed.

Order and Judgment affirmed.

[illegible]

42095

IRWIN H. KELLER,
Appellee,

v.

CHRISTOPHER L. ANTON, et al.

IDA RUSSELL MACK,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

316 I.A. 114²

Plaintiff filed his complaint in chancery to foreclose the lien of a trust deed, executed November 29, 1932, by Christopher L. Anton, to secure payment of \$6,000. The case was referred to a Master in Chancery, who heard the evidence, recommended a decree as prayed for. The recommendation was sustained by the Chancellor and a decree entered June 13, 1941. September 11, 1941, defendant Ida Russell Mack, filed her notice of appeal from the decree of June 13, 1941.

The record is much confused. Numerous papers were filed, notices given, orders entered, and a receiver appointed from which latter order an Interlocutory appeal was prosecuted to this court, #41090. We affirmed the order appointing a receiver and in sustaining the appointment we said: "The undenied facts which were made to appear upon the hearing of the motion show an abundant justification for the appointment of the receiver". The record discloses that the complaint and petition filed by the plaintiff for the appointment of a receiver showed "abundant justification" for the appointment of the receiver, and that matter should have been disposed of in a very few minutes but there were numerous motions, notices of motions, and other dilatory tactics pursued by the defendant.

As near as we can ascertain defendant's position is that since there was no replication filed to her answer, which she claims set up an affirmative defense, the averments of the answer

IRVIN, H. KELLEY,
Plaintiff,

v.

CHRISTOPHER L. ANTON, et al.
Defendants.

IDA RUSSELL WALK,
Applicant.

THE JUSTICE OF THE PEACE IN THE COUNTY OF THE STATE OF

Plaintiff filed his complaint in the County of the State of

the lien of a first deed, executed November 20, 1905, by

Christopher L. Anton, to secure payment of \$5,000. The case

was referred to a Master in Chancery, who held the evidence,

recommended a decree as prayed for. The recommendation was en-

tained by the Chancellor and a decree entered June 13, 1906.

September 11, 1906, defendant Ida Russell Walk, filed her notice

of appeal from the decree of June 13, 1906.

The record is much confused. Numerous papers were filed,

notices given, orders entered, and a receiver appointed from

which latter order an interlocutory appeal was prosecuted to this

court, \$1000. He affirmed the order appointing a receiver and

in sustaining the appointment he said: "The undisputed facts were

were made to appear upon the hearing of the motion show an abundant

justification for the appointment of the receiver." The record

discloses that the complaint and petition filed by the plaintiff

for the appointment of a receiver showed 'abundant justification'

for the appointment of the receiver, and that matter should have

been disposed of in a very few minutes but there were numerous

motions, notices of motions, and other dilatory tactics pursued

by the defendant.

As near as we can ascertain defendant's petition is that

since there was no replication filed to her answer, which she

must be taken as true.

The complaint contained the usual allegations found in a suit brought to foreclose the lien of a trust deed. Defendant in her answer set up that Christopher L. Anton, the maker of the note and trust deed "did not execute a legal trust deed" and, therefore there was no legal conveyance of the property by Anton "to any person other than to her [defendant Ida Russell Mack] who is the true owner of said property, with rights superior to any other person excepting Cook county, Illinois to whom a small amount of taxes are now due." These allegations are wholly insufficient to constitute any defense. They are but mere conclusions of the pleader. She alleged that she is the true owner of the property but how or when she became such owner is not stated. Obviously no replication was required.

Defendant filed a number of cross-bills and orders were entered striking each of them but no appeals were taken so the correctness of the orders are not now open. But in any event they were properly stricken. By the cross-bills defendant sought to obtain a set-off of \$1500, which she alleged she had paid to Salzman, Stern and Blum upon representation "that they were the owners of a good mortgage" on the property. While the order striking the last cross-bill was not appealed from and therefore is not before us, yet we think we ought to say it was properly stricken. The allegations were wholly insufficient to show that plaintiff, Keller, was not the owner of the notes and trust deed in suit.

A further point is made that at the time the trust deed in question was acknowledged by Anton on November 29, 1932, before Mamie C. Merrick, a notary public, she had not filed a memorandum of her appointment in the office of the County Clerk as required by §5, chap. 99, Ill. State Bar Stats., 1941. There is no merit in this contention. The record discloses that Mamie C. Merrick

must be taken as true.

The complaint contained the usual allegations found in a suit brought to foreclose the lien of a trust deed. Defendant in her answer set up that Christopher J. Anton, the maker of the note and trust deed "did not execute a legal trust deed" and, therefore there was no legal conveyance of the property by Anton "to any person other than to her [defendant Ida Russell Mack] who is the true owner of said property, with rights superior to any other person excepting Cook county, Illinois to whom a small amount of taxes are now due." These allegations are wholly insufficient to constitute any defense. They are but mere conclusions of the pleader. She alleged that she is the true owner of the property but how or when she became such owner is not stated. Obviously no replication was required.

Defendant filed a number of cross-bills and orders were entered striking each of them but no appeals were taken to the correctness of the orders are not now open. But in any event they were properly stricken. By the cross-bills defendant sought to obtain a set-off of \$1500, which she alleged she had paid to Salomon, Stern and him upon representation "that they were the owners of a good mortgage" on the property. While the order striking the last cross-bill was not appealed from and therefore is not before us, yet we think we ought to say it was properly stricken. The allegations were wholly insufficient to show that plaintiff, Salomon, was not the owner of the notes and trust deed in suit.

A further point is made that at the time the trust deed in question was recorded by Anton on November 22, 1925, before Mamie G. Gertick, a notary public, she had not filed a memorandum of her appointment in the office of the County Clerk as required by § 8, Chap. 111, Statute Book, 1925. There is no merit

was regularly appointed a notary public, and the fact that she had not complied with §5 did not render the trust deed ineffective or invalid. McCormick v. Higgins, et al., 190 Ill. App. 241. In that case Mr. Justice Dibell in delivering the opinion of the court said: (p. 260) "The affidavit of nonresidence was sworn to before H. M. Kelly, a notary public. Section 5 of chapter 99 of the Revised Statutes (J. & A. §7841) requires a notary public, before entering upon the duties of his office, to have a memorandum of his appointment and of the time when his office will expire entered in the office of the county clerk of his county. When this affidavit was sworn to, Kelly had been a notary public for a considerable time, but had not then caused such an entry to be made. It is contended that this invalidates the entire proceeding. The statute does not say that his acts shall be void if he fails to comply with the regulation. The public, executing papers before a notary public, are not required to investigate the records in the county clerk's office to find whether such an entry has been made, and it would be monstrous to hold that every act performed by or before a notary public who has failed to obey this statute is void, and thus invalidate legal proceedings and titles many years after the acts performed."

Counsel for defendant in his reply brief says that the cases cited by plaintiff were "decided before the Notary Public Act was amended", no reference is made to any amendment nor to any section of the act and we have been unable to find that section 5 has been amended. Moreover, Merrick was a notary de facto at the time the trust deed was executed. People v. Severinghaus, 313 Ill. 456, 469.

A further point is made that "the trial court erred in approving the receiver's reports without giving a full hearing thereupon". The record discloses the receiver filed a number

was regularly appointed a notary public, and the fact that he had not complied with § 3 did not render the transaction ineffective or invalid. McDonald v. Hixson, 120 Ill. App. 2d 111, 121. In that case Mr. Justice Dill is following the opinion of the court said: (p. 121) "The affidavit of nonresidence was sworn to before W. W. Kelly, a notary public, Section 3 of chapter 99 of the Revised Statutes (C.S. 1934), requires a notary public, before entering upon the duties of his office, to have a memorandum of his appointment and of the time when his office will expire entered in the office of the county clerk of his county. When this affidavit was sworn to, Kelly had been a notary public for a considerable time, but had not then caused such an entry to be made. It is contended that this invalidates the entire proceeding. The statute does not say that his acts shall be void if he fails to comply with the requirement. The public, executing papers before a notary public, are not required to investigate the records in the county clerk's office to find whether such an entry has been made, and it would be monstrous to hold that every act performed by or before a notary public who has failed to obey this statute is void, and thus invalidate legal proceedings and vitiate many years after the acts performed." Counsel for defendant in his reply brief says that the cases cited by plaintiff were "quoted before the notary public Act was amended", no reference is made to any amendment nor to any section of the act and he have been unable to find that section 3 has been amended. Moreover, Hixson was a notary at the time the trust deed was executed. People v. Hixson, 120 Ill. App. 2d 111, 121, 122. A further point is made that the trial court found in approving the receiver's report without giving a bill of costs thereon. The record discloses the receiver filed a number

of reports and orders were entered approving them, and no appeal was taken from any of such orders. There is nothing in the record that would justify the statement that defendant was not permitted a hearing on the reports.

On the hearing the notes and trust deed were produced by counsel on behalf of plaintiff. This made a prima facie case of ownership as we said in our opinion filed in the receivership proceedings, above referred to, #41090. The defendant offered no evidence before the master or at any other time. If she had any defense to the foreclosure suit an examination of the record fails to disclose it.

What we said in our opinion in the receivership matter is applicable here. We there said: "The objections of the defendants are purely technical and without any merit whatsoever."

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

of property and other matters involving the same, and the same was taken from any of said property. There is nothing in the record that would justify the statement that defendant was not permitted a hearing on the property.

In the hearing the record and facts were presented by counsel on behalf of plaintiff. This was a trial by jury of ownership as was said in our opinion filed in the proceedings previously, above referred to, 19100. The defendant offered no evidence before the master or at any other time. It was the duty of the defendant to the foreman to make a statement of the facts and to discuss it.

What we said in our opinion in the proceedings referred to is applicable here. We there said: "The question of the defendant's and purely technical and without any right whatsoever. The decree of the district court of Cook County is affirmed."

WILLIAM H. HARRIS,

Attorney, J. J., and W. H. HARRIS, J., 19100.

42132

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel., JOHN S. RUSCH,)
Appellee,)

v.)

BEN L. ORLOFF,)
Appellant.)

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

316 I.A. 115

A petition was filed in the County court of Cook county against the judges and clerks of election of the 61st precinct of the 24th ward, charging them with misconduct, arising out of the primary election held April 12, 1938.

The case was heard by Judge Jarecki, and after hearing judgment was entered discharging the two clerks and finding the three judges guilty as charged. Two of them were sentenced to confinement in the County jail, the other was fined \$500. On appeal to this court the judgment was reversed and the cause remanded. 308 Ill. App. 317 (abst.).

Afterward the case was reinstated in the County court and a trial had before another judge. No evidence was introduced but by agreement of counsel the abstract of record filed on the former appeal was considered by the court, as containing all of the evidence and upon consideration the court found that defendants "did knowingly, fraudulently and unlawfully permit or acquiesce in permitting official ballots to be changed, altered and erased by persons other than the voter", that defendants while serving as judges of election "did knowingly, fraudulently and unlawfully make false canvass, tally, proclamation, and return of votes cast". During the hearing counsel for the people stated he would recommend that two of the judges, viz. Solomon and Jennings, be fined \$50 each and that the other judge, Orloff, be sentenced to jail for 60 days. When this suggestion was made counsel for defendant replied "we have no objection to the \$50

1916

STATE OF ILLINOIS
JAMES L. BRADY, Appellant,
vs.
JOHN S. BRADY, Respondent.

WILLIAM C. BRADY, Attorney for Appellant.

A petition was filed in the County Court of Cook County against the judges and clerks of election of the 6th precinct of the 24th ward, charging them with misconduct, arising out of the primary election held April 17, 1916. The case was heard by Judge Jacoby, and after hearing judgment was entered affirming the two clerks and finding the three judges guilty as charged. Two of them were sentenced to confinement in the County Jail, the other was fined \$500. On appeal to this court the judgment was reversed and the cause remanded. 308 Ill. App. 317 (April 1917).

Afterward the case was reinstated in the County Court and a trial had before another judge. No evidence was introduced but by agreement of counsel the abstract of record filed on the former appeal was considered by the court, as containing all of the evidence and upon consideration the court found that defendant "did knowingly, fraudulently and unlawfully permit or cause to be submitted official ballots to be changed, altered and erased by persons other than the voter," that defendant while serving as judge of election "did knowingly, fraudulently and unlawfully make false canvasses, tally, proclamation, and return of votes and." Finding the hearing counsel for the people stated he would recommend that two of the judges, viz. Solomon and Tennessee, be fined \$50 each and that the other judge, Orloff, be sentenced to jail for 30 days. When this suggestion was made counsel for defendant moved for a new trial on the ground that the

fine as to the two respondents. I think counsel is correct as to the two respondents. I don't think, however, after your Honor reads the record that there should be that sharp differentiation made by the Court as to these three respondents. I don't think that after the Court reads that record that any one of these respondents is any more culpable than any of the others. If the Court feels that there should be any slight treatment given to any of these respondents, in that case your Honor should give Orloff a more substantial fine. I don't think that this case warrants the imposition of any such sentence as sixty days in the County Jail."

The case was then adjourned and two days thereafter the court announced his decision. He followed the recommendations of counsel for the people, fining two of the judges \$50 each, which fine was paid and sentencing the other judge, Orloff, to be confined in jail for 60 days. Orloff prosecutes this appeal.

In our opinion on the former appeal we discussed the evidence introduced somewhat in detail so that we feel it is unnecessary to again refer to it here. We held that since Judge Jarecki was a candidate at the primary election involved he should not have tried the case. We also said: "We are not satisfied with the findings of the court nor the penalties imposed. As we said in People ex rel. Rusch v. Lidovsky, supra. 'It is just as important that persons accused but innocent should be exonerated as that those guilty should be punished'" and we reversed the judgment and remanded the cause for a new trial.

The evidence that was before us on the former appeal is the same evidence in the record now before us. We are in as good a position to determine the truth of the matters shown by the evidence as was the trial judge. He had but the printed abstract, no witnesses testified before him. We have again considered the

line as to the two respondents. I think counsel is correct as to the two respondents. I don't think, however, after your Honor reads the record that there should be that different time made by the Court as to these three respondents. I don't think that after the Court reads that record that any one of these respondents is any more culpable than any of the others. If the Court feels that there should be any slight treatment given to any of these respondents, in that case your Honor should give Orloff a more substantial time. I don't think that this case warrants the imposition of any such sentence as sixty days in the County Jail."

The case was then adjourned and two days thereafter the court announced his decision. He followed the recommendation of counsel for the people, fining two of the judges \$50 each, which time was paid and sentencing the other judge, Orloff, to be confined in jail for 60 days. Orloff moved on the 15th day.

In our opinion on the former appeal we discussed the evidence introduced somewhat in that it is what we feel is unnecessary to again refer to it here. We held that since Judge Jaroski was a candidate at the primary election involved in Jaroski not have tried the case, we also said: "we are not satisfied with the findings of the court nor the penalties imposed. We are said in People v. Jaroski, 1934, 11 N.Y.2d 100. It is clear as important fact persons accused of the same crime should be treated as that court should be instructed." and we reversed the judgment and remanded the case for a new trial.

The evidence that was before us on the former appeal is the same evidence in the record now before us. We are in as good a position to determine the truth of the matters shown by the evidence as was the trial judge. We had not the printed record, no witnesses testified before him. We have again considered the

evidence in the record and adhere to what we said in our former opinion. But since counsel for two of the defendants, Solomon and Jennings, on the hearing agreed to the suggestion made by counsel for the people that these two judges be fined \$50 each, and which suggestion and recommendation counsel for defendants concurred, we are of opinion that Orloff should receive the same punishment and be fined \$50. We are unable to see any substantial difference in the conduct of any of the three judges. We think it appears that the learned trial judge imposed a heavier sentence against Orloff because the court was of opinion that Orloff had acted as judge of election before. Which is not the fact because the evidence discloses he acted as clerk at but one prior election.

For the reasons stated the judgment is reversed and the cause remanded to the trial court with a suggestion that judgment be entered against Orloff, imposing a fine of \$50.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

evidence in the record and others to what he said in his former
opinion. But these counsel for two of the defendants, Wilson
and Jennings, on the hearing agreed to his suggestion that he
counsel for the people that these two judges be taken into
and which suggestion and recommendation against the defendants
concerned, we are of opinion that Chief Justice Rogers was
unimpaired and he filed 430. He was unable to see any substantial
difference in the conduct of any of the three judges, we think
it appears that the learned trial judge imposed a heavier sentence
against relief because the court was of opinion that relief was
acted as a type of election before, which is not the fact because
the evidence disclosed he acted as clerk at that time election,
For the reasons stated the judgment is reversed and the
cause remanded to the trial court with a suggestion that judgment
be entered against relief, involving a fine of \$50.

REVEREND AND HONORABLE,

Ketchum, P. L., and Secretary, J., Honorable.

Handwritten signature

Abstract

GEN. NO. 9792

AGENDA NO. 14

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

316 I.A. 115²
42
237

May Term, 1942

ANNA KAZNOWSKI, an infant,
by JOSEPH KAZNOWSKI, her
next friend,

Appellee,

v.

City of LaSalle, a municipal
corporation,

Appellant.

APPEAL FROM
CIRCUIT COURT OF
LA SALLE COUNTY.

DOVE, J.:

This is a personal injury suit by a minor, suing by her father as next friend, to recover damages for injuries sustained by her from a fall through tripping in a hole in a public sidewalk in the City of LaSalle, whereby her right arm was broken. There was a trial by jury in the circuit court of LaSalle County, a verdict of \$400.00 for the plaintiff, judgment on the verdict, and the city has appealed.

Out of twelve grounds assigned for reversal, the only ones argued are that the court erred in denying appellant's motion for a directed

31014-118

IN THE
COURT OF APPEALS
SECOND DISTRICT

May Term, 1942

APPELLATE COURT OF
LA SALLE COUNTY.

ANNA KASIMOWSKI, et al.,
by JOSEPH KASIMOWSKI, her
next friend,
appellees,
v.
City of LaSalle, a municipal
corporation,
appellant.

DOVE, J.:

This is a personal injury suit by a minor, suing by her father as next friend, to recover damages for injuries sustained by her from a fall through tripping in a hole in a public sidewalk in the city of LaSalle, whereby her right arm was broken. There was a trial by jury in the circuit court of LaSalle County, a verdict of \$400.00 for the plaintiff, judgment on the verdict, and the city has appealed. Out of twelve grounds assigned for reversal, the only ones argued are that the court erred in denying appellant's motion for a directed

verdict, and ^{in denying} its motion for judgment notwithstanding the verdict, on the theory that the defects in the sidewalk were so slight that the city was not negligent as a matter of law; and that its motion for a new trial should have been granted because the verdict is excessive.

A motion to direct a verdict is in the nature of a demurrer to the evidence. In considering such a motion the evidence must be taken in its aspect most favorable to the adverse party, and the only question is whether there is any evidence tending to prove the allegations of the complaint. (Ryan v. Deneen, 375 Ill. 452; Shuten v. Bloomenthal, 371 id. 244.) Under such a motion, the plaintiff is entitled to the benefit of all the facts that the evidence tends to prove and all inferences that can be drawn therefrom, and the evidence most favorable to her must be taken as true. (Pollard v. Broadway Central Hotel Corporation, 353 Ill. 312.) If there is any evidence ^{fairly} tending to support a cause of action, the case is one for the jury, and it is error for the court in such a case to instruct the jury to find for the defendant. (Missouri Malleable Iron Co., v. Dillon, 206 Ill. 145; ^{Chicago} Union Traction Co. v. Lundberg, ^{Id.} 215 id. 289.) The question of negligence does not become a question of law unless the evidence is such that all reasonable minds would agree the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence. (Petro v. Hines, 299 Ill. 236.) A motion for judgment notwithstanding the verdict is governed by the same rules. (Ill. Rev. Stat. 1941, chap. 110, par. 259.22; Russell v. Richardson, 302 Ill. App. 589.) ~~Under these rules in civil cases the evidence is~~

The record shows that the accident occurred on the afternoon of June 10, 1939. It was a bright day. Appellee was one week less than eight years old. She and her sister were walking west, ahead of her

verdict, and its motion for judgment notwithstanding the verdict, on the theory that the defects in the sidewalk were so slight that the city was not negligent as a matter of law; and that its motion for a new trial should have been granted because the verdict is excessive.

A motion to direct a verdict is in the nature of a demurrer to the evidence. In considering such a motion the evidence must be taken in its aspect most favorable to the adverse party, and the only question is whether there is any evidence tending to prove the allegations of the complaint. (Ryan v. Green, 375 Ill. 462; Smith v. Bloomenthal, 371 Ill. 244.) Under such a motion, the plaintiff is entitled to the benefit of all the facts that the evidence tends to prove and all inferences that can be drawn therefrom, and the evidence most favorable to her must be taken as true. (Pollard v. Broadway Co., 145 Ill. 312.) If there is any evidence tending to support a cause of action, the case is one for the jury, and it is error for the court in such a case to instruct the jury to find for the defendant. (Missouri Northern Iron Co. v. Dillon, 308 Ill. 145; Union Traction Co. v. Lunsford, 315 Ill. 389.) The question of negligence does not become a question of law as the evidence is such that all reasonable minds would agree the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence. (Tervo v. Alton, 303 Ill. 336.) A motion for judgment notwithstanding the verdict is governed by the same rules. (Ill. Rev. Stat. 1941, chap. 110, par. 359.2a; Ingle v. Richardson, 303 Ill. App. 589.)

The record shows that the accident occurred on the afternoon of June 10, 1939. It was a bright day. There was one week less than eight years old. The end for eleven were walking west, ahead of her.

mother and her grandmother, along the concrete sidewalk on the south side of First Street in the main part of the business district in the City of LaSalle. Appellee was on the north side of her sister. There was a hole, irregular in shape, in the sidewalk, extending south from the curb about five feet toward the building line. The portion next the curb was where a pole had been removed. The surface of the sidewalk had become broken and the concrete was out, leaving a hole of varying widths, being about two feet wide in some places, and narrower in others. It was from one and one half to two inches deep. According to the testimony of the city engineer it was one and seven-tenths feet wide and seven-eighths inches deep with an average depth of one and three fourth inches. Plaintiff tripped in the hole and fell, breaking her arm. The injury consisted of a fracture and dislocation of the head of the radius. The next day an X-ray disclosed the fracture, which was reduced the following day at a hospital. The arm was immobilized in a cast and an aluminum splint for about six weeks, and appellee carried it in a sling for two or three weeks longer. At the time of the trial in November, 1941, there was an apparent complete recovery. The arm pained her considerably until it was placed in the cast. She was unable to be out and play with other children during the six weeks period. The doctor bill was \$50.00 and the hospital bill was about \$11.00.

The owner of the adjacent building testified the hole in the sidewalk had existed in the same condition eight or ten years, and that she had seen city policemen and the chief of police walk along the sidewalk in front of her building; that she had sprained her ankle in the hole and a lot of other people had tripped in it; and that two or three years prior to the accident she had notified the city engineer of the condition of the sidewalk. The city engineer testified he did

[illegible]

not remember the witness or anyone else reporting the condition of the sidewalk to him; that if she had talked to him about it he would have notified the owners, but he did not deny that she had reported its condition to him.

Appellant cites cases in this State and from other jurisdictions where adjoining sections of sidewalk were constructed at different levels. It is apparent that an incline in a street grade or other conditions may require such construction, and it has been held that a municipality is not guilty of negligence in such cases. No such condition obtains here. The photographs in evidence show an approximately level street and sidewalk with the irregularly shaped hole above described. Constructing a sidewalk on different levels where the pedestrian will usually anticipate the change of grade by the surroundings, such as a slant in the grade or a step down from a curb is a wholly different matter from constructing a sidewalk on a level and allowing a hole to exist therein which the pedestrian has no cause to anticipate. Cases of the first class have no application here.

While a municipality is not an insurer against accidents, and is only bound to use reasonable care to keep its sidewalks reasonably safe for ~~the~~ amount and kind of travel which may be fairly expected upon them, (Graham v. City of Chicago, 346 Ill. 638; Boender v. City of Harvey, 251 id. 228), a pedestrian on a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel. To hold that a person is absolutely bound to keep his eyes fixed upon a sidewalk in search of defects and dangerous places would be to establish a manifestly unreasonable and impracticable ^{cable} rule. (Graham v. City of Chicago, supra; City of Chicago v. Babcock, 143 Ill. 358.)

not remember the witness or anyone else reporting the condition of the sidewalk to him; that if she had talked to him about it he would have notified the owners, but he did not deny that she had reported the condition to him.

Appellant cites cases in this State and from other Jurisdic-

tions where adjoining sections of sidewalks were constructed at different levels. It is apparent that a walking in a street, grade or other conditions may require some construction and it has been held that a municipality is not guilty of negligence in such cases. In such condition obtain here. The photograph in evidence is of an irregularly level street and sidewalk with the irregularly shaped hole about described. Constructing a sidewalk on different levels where the pedestrian will use it anticipate the change of grade by the surrounding, such as a slight in the grade or a step down from a curb is a wholly different matter from constructing a sidewalk on a level and allowing a hole to exist therein when the pedestrian has no cause to anticipate. Cases of the first class have no application here.

While a municipality is not an insurer against accidents, and is only bound to use reasonable care to keep the sidewalk like reason-ably safe to the amount and kind of travel which may be fairly expected upon them, (Grant v. City of Chicago, 348 Ill. 626; Bender v. City of Harvey, 361 Ill. 328), a pedestrian on a sidewalk may early assume that it is in a reasonably safe condition for travel. To hold that a person is obligated to keep his eyes fixed upon a sidewalk in search of defects and dangerous places would be to establish a manifestly unreasonable and impracticable rule. (Grant v. City of Chicago, supra; 157 Ill. 352; 143 Ill. 352).

A child between the ages of seven and fourteen years is not required to exercise as high a degree of care as a person of mature age and experience. ^{and his culpability is a question of fact for the jury, *Meskalunas v. C. and W. J. R.R. Co.*, 318 Ill. 142 at page 150.} (*Mueth v. Jaska*, 302 Ill. App. 289; *Owens v. Guernsey*, ~~318 Ill. 142~~), and on this appeal it is not claimed that appellee was guilty of contributory negligence.

The mere happening of an accident raises no presumption that it was caused by the defendant's negligence, (*Huff v. Illinois Central Railroad Co.*, 362 Ill. 95; *Spring Valley Coal Co., v. Buzis*, 213 id. 341), but in this case the uncontradicted evidence shows that one person sprained her ankle in the hole, several others tripped in it, including appellee, who suffered a broken arm. This conclusively shows the hole was dangerous to pedestrians. It had existed in the same condition for eight or ten years and the city had actual notice of it. Even if there had been no actual notice, its existence for so long a time charged the city with knowledge thereof. (*Graham v. City of Chicago*, supra.) Under such evidence and the applicable law, it cannot be said that the defect was so slight that the city was not guilty of negligence as a matter of law. The trial court did not err in refusing to direct a verdict for appellant or in refusing to render judgment for it notwithstanding the verdict. Furthermore, if the assignment that the court erred in denying appellant's motion for a new trial had been argued on this phase of the controversy, we should be obliged to hold that the verdict is not against the manifest weight of the evidence, but the assignment, not being argued, is considered as abandoned. Decisions where judgment for the plaintiff were affirmed on negligence of the defendant comparable or analogous to the facts in this case are found in *Graham v. City of Chicago*, supra; *White v. City of Belleville*, 290 Ill. App. 616; *Temple v. City of Chicago*, 303 id. 59.

A child between the ages of seven and fourteen years is not required

to testify as to the age of a person of whom he has knowledge. *State v. Gentry*, 100 Ill. 2d 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Guilty of contributory negligence.

The representation of an accident unless no presumption that it

was caused by the defendant's negligence, (*Smith v. Illinois Central*

Railroad Co., 100 Ill. 2d 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

241), but in this case the undisputed evidence shows that one

person approached the hole in the hole, however, others testified in it,

including the other, who testified a broken one. This conclusively

shows the hole was dangerous to those who used it. It had existed in the

same condition for eight or ten years and was in a public place

of it. Even if there had been no other notice, the existence for

so long a time changed the duty with knowledge thereof. (*Orman v.*

City of Chicago, supra.) Under such evidence and the applicable law,

it cannot be said that the defect was so slight that the city was not

guilty of negligence as a matter of law. The city could not say

in relation to direct a verdict for judgment on its relation to render

judgment for its notwithstanding the verdict. Furthermore, in the

assignment that the court erred in denying special verdict for a

new trial had been argued on this issue of the contributory negligence

be obliged to hold that the verdict is not against the manifest weight

of the evidence, but the assignment, not being argued, is considered

as abandoned. Decisions were judgment for the plaintiff were affirmed

on negligence of the defendant contributory negligence or otherwise to the facts in

this case are found in *Orman v. City of Chicago*, supra; *Wiley v. City*

of Belleville, 200 Ill. 2d 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589

We do not agree with the claim that the verdict is excessive. The amount of damages to be awarded is ordinarily a question for the jury, and a verdict will not be disturbed unless it is clearly excessive or inadequate, indicating passion or prejudice on the part of the jury. (Mueth v. Jaska, ^{352 Ill. App. 289;} ~~Ill. App. 289;~~ Owens v. Guernsey, ^{241 Ill. 477.} ~~Ill. App. 477.~~) In this case appellee's mother testified to her nervous condition after the accident. There was no testimony as to a casual connection, and on appellant's motion the testimony was stricken and the jury were instructed they must not regard it. Considering the nature and extent of the injury, the expenses incurred thereby and the time appellee was incapacitated, the amount was very reasonable, and does not indicate the jury were influenced by the stricken testimony. The court did not err in denying the motion for a new trial.

Appellee's motion in this court to assess damages of ten per cent of the amount of the judgment under section 23 of the Costs act (Ill. Rev. Stat. 1941, chap. 33, par. 23) on the ground that the appeal was prosecuted for delay, is denied. While the evidence is overwhelmingly in favor of appellee, there is nothing in the record which indicates the appeal was for delay and not in good faith.

The judgment of the trial court is affirmed.

Judgment affirmed.

He did not agree with the fact that the verdict is excessive.

The amount of damages to be awarded is ordinarily a question for the jury, and a verdict will not be disturbed unless it is clearly

excessive or inadequate, indicating passion or prejudice on the part of the jury. (Smith v. Jones, 100 Cal. 487, 34 P. 2d 487.)

In this case appellee's motion resulting to set aside the verdict after the verdict. There was no testimony as to a causal connection

between the appellant's motion and the verdict, and the jury were instructed they must not regard it. Considering the nature and extent of the injury, the evidence showed thereby and the time appellee was incapacitated, the amount was very reasonable, and does not indicate the jury were influenced by the unbroken testimony.

The court did not err in denying the motion for a new trial.

Appellee's motion in this case to reverse damages of ten per

cent of the amount of the judgment entered in 1923 of the date of (Ill. Rev. Stat. 1914, ch. 13, sec. 23) on the ground that the verdict was excessive for delay, is denied. While the evidence is somewhat in favor of appellee, there is nothing in the record which indicates the verdict was for delay and not in good faith.

The judgment of the trial court is affirmed.

Argument affirmed.

42347

3161A. 139

KARL E. SEYFARTH,
Appellee,

vs.

GEORGE E. LEONARD,
Appellant

INTERLOCUTORY APPEAL
FROM
SUPERIOR COURT,
COOK COUNTY.

JD
239

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver in ^achancery suit brought by plaintiff seeking an accounting of funds claimed to be due him from the defendant arising out of a contract for the dissolution of their partnership.

Although the cause was referred to a master no evidence has been taken and the issues on this appeal are presented solely by the pleadings- the complaint and plaintiff's petition for the appointment of a receiver, and defendant's answers and plaintiff's replies.

The parties were law partners practicing under the name of Seyfarth and Leonard, and by written agreement dissolved the partnership in 1935 and divided between them certain pending cases, several of which were bank stockholder liability suits in which the law firm represented the plaintiffs and were specifically named in a schedule attached to plaintiff's petition as Exhibit "B." By the agreement each of the parties respectively was charged with responsibility for the completion of the work required in the prosecution of the cases assigned to him; each was to collect the fees in such cases and retain one-half and pay the other half of the fees to the other party.

Plaintiff's petition alleged that defendant had collected

100

[Faint handwritten signature]

AD

[illegible]

This is an appeal from an inventory taken at a certain receiver in Germany and brought by defendant's accounting of funds claimed to be due him from the defendant arising out of a contract for the disposition of their personal property.

Although the case was referred to a master in equity, has been taken and the issues on this appeal are presented solely by the pleadings - the complaint and defendant's petition for the appointment of a receiver, and defendant's answers and plaintiff's replies.

the parties are law partners practicing under the name of Joynt and Leonard, and by written agreement delivered the partnership in 1935 and divided between them certain business, several of which were bank stockholder liability cases, in which the law firm represented the Plaintiff and were specifically named in a schedule attached to Plaintiff's petition as Exhibit "B". By the agreement each of the parties respectively was charged with responsibility for the completion of the work required in the prosecution of the cases assigned to him; each was to collect the fees in such cases and retain one-half and pay the other half of the fees to the other party. Plaintiff's petition alleges that defendant had collected

fees in certain cases but refused to pay to plaintiff one-half of such fees as required by the dissolution agreement. Defendant's answer asserts that he was entitled to retain a portion or all of the half claimed by plaintiff by reason of numerous and substantial defaults and breaches of the contract by plaintiff. The answer set out in detail these alleged defaults. Plaintiff's reply denies such defaults. We cannot now examine the merits of this controversy for there is no evidence before us and the reference to the master is still pending.

Plaintiff filed a motion asking for the appointment of a receiver to collect and hold the entire amount of the fees collected by defendant, including not only the amount of fees claimed by plaintiff but also those admittedly belonging to the defendant, which motion was allowed and a receiver appointed.

Defendant contends that plaintiff's cause of action is a simple contract claim for money said to be due or to become due from defendant and that this issue is not properly within the jurisdiction of a chancery court. Defendant's argument seems to be based upon the proposition that the agreement of July 1, 1935 terminated the partnership between the parties and therefore there was no question of liquidation presented but only whether there was a breach of contract. We are of the opinion that the proceedings were properly brought in a chancery court. The agreement of July 1, 1935 did not terminate the partnership but dissolved it. The dissolution of a partnership does not necessarily terminate it or the fiduciary relationship of the partners. Ill. Rev. Stats. ch. 106 1/2, sec.30. It has been held that after dissolution the partnership continues until the partnership business has been completed. Thanos v. Thanos , 313 Ill. 499, 506; Witkowsky v. Affeld , 283 Ill. 557; Andrews v. Stinson , 254 Ill. 111, 123.

fees in certain cases but refused to pay to Plaintiff's
of such fees as required by the dissolution agreement. Defendant's
answer asserts that he was entitled to retain a portion of all the
the half claimed by Plaintiff by reason of numerous and substan-
tial defaults and breaches of the contract by Plaintiff. The
answer set out in detail these alleged defaults. Plaintiff
reply denies such defaults. He cannot now examine the merits of
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reference to the matter is still pending.

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be based upon the proposition that the agreement of July 1, 1935
terminated the partnership between the parties and therefore there
was no question of liquidation presented but only whether there
was a breach of contract. He says of the opinion that the proposi-
tions were properly brought in a summary court. The argument of
July 1, 1935 did not terminate the partnership but dissolved it.
The dissolution of a partnership does not necessarily terminate
it or the fiduciary relationship of the partners, Ill. Rev. Stat.
ch. 106 1/2, sec. 30. It has been held that after dissolution the
partnership continues until the partnership business has been
completed. Harmon v. Harmon, 315 Ill. 489, 508; Harmon v.
Harmon, 307 Ill. 307; Harmon v. Harmon, 304 Ill. 111, 113.

In schedule "D" of the agreement was a list of cases in which the partners were jointly interested and were responsible for the completion of the work required. There was a joint duty with respect to these, although their individual appearances may have been filed in such cases. The interest of one partner was retained in all cases handled by the other. There was only a division of labor. There is a provision for legal services by both partners in certain cases; the substitution of both partners in lieu of the appearance of the firm; also, each partner had the right to examine files in any of these cases, and there was a provision for monthly statements of each to the other. We hold that the controversy was properly in the chancery court.

A more serious question presents itself with reference to the appointment of a receiver to collect and retain all of the fees collected by defendant, including one-half of the fees to which admittedly he is entitled. We do not find in the record any issue raised with reference to defendant's fees. The only issue presented is with reference to the other half of the fees, which plaintiff claims and which defendant is withholding for the alleged breaches of the contract stated in defendant's answer.

We find no cases supporting the proposition that a receiver may be appointed of assets about which there is no issue presented. Cochrane v. Potts Son & Co., 47 F.(2d) 1026, involved the validity of certain bonds, and a receiver was appointed to take charge of all of the six issues of the same. On appeal it was held that the District court did not have jurisdiction over five of such issues because the pleadings limited plaintiff's claim to one issue, although he asked for a receiver of all of the issues. The court said: "Examining the jurisdiction of the court over the securities in controversy ***it is perfectly plain that as to none of the bond issues or the collateral securing

In some of the cases a list of cases in which the partners were jointly interested and were responsible for the completion of the work required. There was a joint duty with respect to these, although their individual appearances may have been filed in such cases. The interest of one partner was retained in all cases handled by the other. There was only a division of labor. There is a provision for legal services by both partners in certain cases; the substitution of both partners in lieu of the appearance of the firm; also, each partner had the right to examine files in any of these cases, and there was a provision for monthly statements of each to the other. We hold that the controversy was properly in the chancery court.

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same, excepting issue E, did the plaintiffs' pleadings put their subject matter at issue, or bring them within the ambit of the court's jurisdiction; for while there were general allegations of fraud and confusion in the matter of the affairs of the two companies the plaintiffs' pleadings limited their claim to the bond issue E and nothing was alleged to set up any claim against or charge upon the other securities." And in Scott v. Farmers' Loan & Trust Co., 69 Fed. 17, the court said: "**** the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage." See also Leach & Co. v. Grant, 27 F. (2d) 201. It would seem too clear for argument that the court would have no jurisdiction to appoint a receiver of property about which there is no issue presented for determination.

A general allegation of insolvency of the defendant was contained in plaintiff's petition, which was denied. In argument plaintiff seemed to admit that he could not sustain the allegation of insolvency but claims he is entitled to a receiver "without a showing of insolvency or impending peril to the partnership fund." It is a rule that where essential allegations of a complaint for the appointment of a receiver are denied in a sworn answer, a receiver cannot be appointed unless these denials are overcome by proof. Klass v. Yavitch, 302 Ill.App. 229; Sherman Park State Bank v. Loop Office Bldg. Corp., 238 Ill.App. 450; Schack v. McKey 100 Ill.App. 294.

We hold that the receiver should not have been authorized to collect the entire amount of fees held by the defendant, but to collect only ^{the} half claimed by plaintiff.

We cannot in this case order disposition of the fees held

under court order by any redeiver in any other case.

The order appointing a receiver is reversed in part and the proceedings are remanded with directions to limit the authority of the receiver to the collection of the portion of the fees claimed by the plaintiff, except as to those fees now in the hands of ~~xxx~~ other receivers who, the record shows, will hold such fees until this cause is terminated. Costs of this appeal to be divided equally between the parties. See section 78 of the Practice act (Ill. Rev. Stats. ch.110) for the authority of this court so to order.

REVERSED IN PART AND
REMANDED WITH DIRECTIONS.

Matchett, P.J., and O'Connor, J.concur.

under court order by any receiver in any other case.

The order appointing a receiver is reversed in part and

the proceedings are remanded with directions to limit the

authority of the receiver to the collection of the portion of the
fee claimed by the plaintiff, except as to those fees now in the

hands of xxx other receivers who, the record shows, will hold
such fee until this cause is terminated. Costs of this appeal to

be divided equally between the parties. See section 78 of the

Practice act (111, Rev. Stat. ch. 110) for the authority of

this court so to order.

REVEREND IN CHRIST
BROTHER, THE DIRECTOR.

Mahoney, P.J., and O'Connor, J. concur.

42107

LOUIS J. HUCH, individually and as
trustee under the Last Will and
Testament of George E. Huch, deceased,
Appellant,

vs.

FLORENCE ELIZABETH WICKERSHEIM,
JOSEPHINE HUCH, THE HUCH LEATHER
COMPANY, an Illinois corporation,
G. WHITTIER GALE, as trustee of
the estate of Edwin Vincent Gale,
deceased, and ALFRED JACOBSHAGEN,
(intervenor) and CHARLES E. BYRNE,
Successor-Trustee,
Appellees.

JOSEPHINE HUCH, individually and
as beneficiary under the Last Will
and Testament of GEORGE E. HUCH,
deceased and FLORENCE ELIZABETH
WICKERSHEIM, contingent beneficiary
under said Will,
Counter Claimants--Appellees ,

vs.

LOUIS J. HUCH, individually and as
trustee under the Last Will and
Testament of George E. Huch,
Counter Defendant--Appellant,
and THE HUCH LEATHER COMPANY,
Counter Defendant--Appellee.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

316 I.A. 155

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Louis J. Huch, hereafter called plaintiff, individually and
as trustee under the will of his father, George E. Huch, filed his
complaint in equity asking the advice and directions of the court
as to the execution of the trust; his mother, Josephine Huch, and his
sister, Florence Elizabeth Wickersheim, answered and filed
counterclaims asserting improper conduct on the part of plaintiff
in administering the trust and asked for his removal; the matter
was referred to a master in chancery who took evidence and reported,
sustaining defendants' claims; the chancellor approved this and
entered a decree dismissing the complaint for want of equity and
held that 125 shares of stock of the Huch Leather Company, which
plaintiff claimed to own as an individual, were held by him as

LOUIS J. HUGH, individually and as
trustee under the last will and
Testament of George E. Hugh, deceased,
Appellant,

vs.

FLORENCE ALICE HUGH, deceased,
LOUIS J. HUGH, THE HUGH L. HUGH
COMPANY, an Illinois corporation,
G. WILSON HUGH, as trustee of
the estate of Edwin Vincent Hugh,
deceased, and ALICE L. HUGH,
(intervenor) and CHARLES E. HUGH,
Successor-trustee,
Appellees.

Appellees.

LOUIS J. HUGH, individually and
as beneficiary under the last will
and Testament of GEORGE E. HUGH,
deceased and FLORENCE ALICE HUGH,
deceased and ALICE L. HUGH,
intervenor, contingent beneficiary
under said will,
Counter Defendant-Appellee,

vs.

LOUIS J. HUGH, individually and as
trustee under the last will and
Testament of George E. Hugh,
Counter Defendant-Appellant,
and THE HUGH L. ALICE COMPANY,
Counter Defendant-Appellee.

THE JUSTICE OF THE PEACE COURT OF THE COUNTY OF COOK, ILLINOIS.

Louis J. Hugh, hereafter called plaintiff, individually and
as trustee under the will of his father, George E. Hugh, filed his
complaint in equity asking the advice and directions of the court
as to the execution of the trust; his mother, Florence Alice Hugh, and his
sister, Florence Alice Hugh, answered and filed
counterclaims asserting improper conduct on the part of plaintiff
in administering the trust and asked for his removal; his mother
was referred to a master in chancery who took evidence and reported,
establishing defendants' claims; the chancellor approved this and
entered a decree dismissing the complaint for want of equity and
held that 125 shares of stock of the Hugh L. Alice Company, which
plaintiff claimed to own as an individual, were held by him as

2.

trustee; also, three judgments were entered against plaintiff aggregating \$7,910.50, and he was removed as trustee and a successor trustee appointed in his stead. Plaintiff appeals from this decree and argues that the findings are unsupported by the evidence and contrary to law.

George E. Huch was president of the Huch Leather Company, which is engaged in the business of tanning and preparing horse hides for use by other manufacturers in making various kinds of leather products. He died on August 7, 1934, leaving surviving his widow Josephine, a son (the plaintiff) and his daughter Florence Wickersheim. His property was left to plaintiff as trustee, the net income to be paid to the widow, Josephine, so long as she lived, and upon her death the trust estate to be divided one-half to the daughter, Florence, and one-half to the plaintiff, with certain gifts which are not in issue here. Plaintiff trustee was authorized to continue the business, to handle the securities of the trust property as he might deem best and not to be responsible for any error in judgment but only for the exercise of honesty and good faith.

For the seven years preceding the death of George Huch the business was operated at a loss of over \$215,000. Upon his death plaintiff became president of the company and took steps to create a fund to pay the debts of his father and to provide a fund for his mother. An account on the books of the leather company was opened under the name of the Estate of George E. Huch and there was credited to this account \$100 a week, which was later reduced to \$60. A total of over \$9000 was credited to this account and out of this was paid the funeral and estate expenses and other miscellaneous items. The bulk of this fund was used to pay plaintiff's mother at the rate of \$50 a week, which from August 14, 1934 to February 16, 1937 aggregated \$6,600. Before his death George Huch allowed Josephine \$50 a week, paid by the company, and after his death plaintiff paid his mother approximately the same amount.

2.

trustee; also, these judgments were entered against plaintiff aggregating \$7,910.00, and he was removed as trustee and a receiver trustee appointed in his stead. Plaintiff claims from this decision and argues that the findings are unsupported by the evidence and contrary to law.

George E. Huch was president of the much better known, which is engaged in the business of tanning and producing horse hides for use by other manufacturers in making various kinds of leather products. He died on August 7, 1934, leaving surviving his wife Josephine, son (the plaintiff) and his daughter, Josephine. Plaintiff's property was left to plaintiff as trustee, the net income to be paid to the widow, Josephine, so long as she lived, and upon her death the trust estate to be divided one-half to the daughter, Josephine, and one-half to the plaintiff, with certain rights which are not in issue here. Plaintiff trustee was authorized to continue the business, to handle the accumulation of the trust property as he might deem best and not to be responsible for any error in judgment but only for the exercise of his duty and good faith.

For the seven years preceding the death of George E. Huch the business was operated at a loss of over \$15,000. Upon his death plaintiff became president of the company and took steps to correct a fund to pay the debts of his father and to provide a fund for his mother. An account on the books of the father company was opened under the name of the estate of George E. Huch and there was credited to this account \$100 a week, which was later reduced to \$50. A total of over \$9000 was credited to this account and out of this was paid the funeral and other expenses and of an allowance for the bulk of this fund was used to pay plaintiff's mother at the rate of \$50 a week, which from August 15, 1934 to February 15, 1937 aggregated \$5,800. Before his death George E. Huch allowed Josephine \$10 a week, paid by the company, and after his death plaintiff paid his mother approximately the same amount.

3.

The matter about which plaintiff in his complaint sought advice and directions from the court was in connection with the purchase of stock of the leather company by his father from the estate of Edwin V. Gale, deceased. Gale had owned one-half of the stock. The capital stock at that time was \$300,000.

In 1928 George Huch purchased this half, or 1500 shares, for \$75,000, paying \$50,000 in cash and giving his note for the balance. This stock was reissued on the books of the leather company- 750 shares in the name of George Huch and 749 in the name of Louis Huch. By March, 1933, this indebtedness had been reduced to \$10,000, and George Huch executed a new note to the Gale trustee for \$10,000. In the meantime the capital stock of the leather company had been reduced from \$300,000 to \$50,000 and new certificates were issued to George and Louis Huch. There was deposited with the Gale trustee as collateral to secure the payment of the \$10,000 note, certificate No. 20 for 125 shares of the capital stock belonging to George, and certificate No. 23 for 125 shares issued to Louis Huch.

The entire principal sum of \$10,000, with interest, was unpaid at the time of the death of George, and shortly thereafter plaintiff communicated with the Gale trustee holding the note, requesting him not to sell the stock he held as collateral, saying that some arrangement would be made to pay this note. It was thereafter arranged that the leather company would pay the note at the rate of \$1,000 a year, and payments were thus made, and on April 1, 1940 the unpaid balance on the note was \$5,333.52. Plaintiff's plan was that when the entire note was paid and the collateral released, 100 of the 125 shares issued in the name of George would go to the leather company to reimburse it for the payment of the \$10,000 note. These shares would be canceled and not reissued, and the remaining 25 shares would ^{be} ~~be~~ the property of the trust. This arrangement was set forth in plaintiff's complaint and he asked, as trustee, for directions and advice of the court with reference to this plan.

the latter about which plaintiff in his complaint sought advice and directions from the court was in connection with the purchase of stock of the Leathers company by his father from the estate of Edwin V. Gale, deceased. This had been set out in the stock. The capital stock at that time was \$50,000.

In 1928 George Huch purchased this stock, or 1500 shares, for \$75,000, paying \$50,000 in cash and giving his note for the balance. This stock was returned on the books of the Leathers company - 750 shares in the name of George Huch and 750 in the name of Louis Huch. By March, 1933, this indebtedness had been reduced to \$10,000, and George Huch executed a new note to the Gale trustee for \$10,000. In the meantime the capital stock of the Leathers company had been reduced from \$30,000 to \$20,000 and new certificates were issued to George and Louis Huch. There was deposited with the Gale trustee as collateral to secure the payment of the \$10,000 note, certificate No. 20 for 125 shares of the capital stock belonging to George, and certificate No. 23 for 125 shares issued to Louis Huch.

The entire principal sum of \$10,000, with interest, was due at the time of the death of George, and shortly thereafter plaintiff communicated with the Gale trustee holding the note, requesting him not to sell the stock as held as collateral, saying that some arrangement could be made to pay this note. It was thereafter arranged that the Leathers company would pay the note at the rate of \$1,000 a year, and payments were thus made, and on April 1, 1940 the unpaid balance on the note was \$5,553.32. Plaintiff's plan was that when the entire note was paid and the collateral released, 100 of the 125 shares issued in the name of George would go to the Leathers company to reimburse it for the payment of the \$10,000 note, and 25 shares would be cancelled and not released, and the remaining 25 shares would be the property of the trustee. This arrangement was set forth in plaintiff's copy of the note and the check, for directions and advice of the court with reference to a plan.

4.

All of the books and reports of the company were produced before the master for examination and inspection, and it was shown that under the arrangement proposed by plaintiff the trust estate would own free and clear over \$18,000. The master found, and the chancellor approved, that the plan proposed by plaintiff as trustee was inequitable and unjust to Josephine Huch and Florence Wickersheim, and the complaint was dismissed for want of equity. No reasons appear in the master's report or in the decree showing the basis for this conclusion.

It would seem proper for the trustee, for the purpose of avoiding a sale by the Gale trustee of the collateral stock deposited to the \$10,000 indebtedness of George Huch, to make some arrangement whereby this debt should be paid and the trust relieved of this burden without loss. We hold that the plan to pay this debt in installments by the leather company (as the only available source of cash were the funds of this company) thus substantially reducing the indebtedness, was fair and just to all the interested parties.

Moreover, the record shows that on October 8, 1941, all parties being present and assenting, the court entered an order authorizing the leather company to purchase the George Huch note from the Gale estate. When the leather company has paid the amount of George Huch's debt to the Gale estate, arrangements must be made to reimburse out of dividends the leather company for its funds so expended in the preservation of the trust estate.

The plan seems fair and equitable and authorized by the terms of the will under the provision that plaintiff-trustee had power to settle, compound and compromise all claims against the estate of George Huch, with as full power and authority as the testator himself might have had if living.

It is the duty of a trustee to seek the aid of a court of equity

All of the books and reports of the company were produced before the master for examination and inspection, and it was shown that under the arrangement proposed by plaintiff the trust estate would own free and clear over \$18,000. The master found, and the chancellor approved, that the plan proposed by plaintiff as trustee was indefensible and unjust to Josephine Huch and Florence Wicksheim, and the complaint was dismissed for want of equity. No reasons appear in the master's report or in the decree showing the basis for this conclusion.

It would seem proper for the trustee, for the purpose of avoiding a sale by the Gale trustee of the collateral stock deposited to the 10,000 indebtedness of George Huch, to make some arrangement whereby this debt should be paid and the trust relieved of this burden without loss. It is held that the plan to pay this debt in installments by the leather company (as the only available source of cash were the funds of this company) thus substantially reducing the indebtedness, was fair and just to all the interested parties.

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The plan seems fair and equitable and authorized by the terms of the will under the provision that plaintiff-trustee had power to settle, compound and compromise all claims against the estate of George Huch, with as full power and authority as the testator himself might have had if living.

It is the duty of a trustee to seek the aid of a court of equity

5.

in the administration of a trust. Whitman v. Fisher , 74 Ill. 147; Warner v. Mettler , 260 Ill.416. The chancellor in dismissing the complaint deprived plaintiff of the right to have the advice and consideration of the court as to this plan and left all the parties in interest in no better position than they were prior to the filing of the complaint. "Courts of equity will assist trustees and protect them in the due performance of the trust whenever they seek the aid and direction of the court as to the establishment, the management or the execution of it." (2 Story's Eq. Jur. (13th ed.) sec. 961.) It was error to dismiss the complaint.

The master, approved by the chancellor, found that Louis J. Huch did not own, individually, certificate No. 23 for 125 shares of stock of the leather company, but found that he owned the same as trustee. This conclusion is not supported by the evidence. The stock book of the company shows that plaintiff owned a substantial number of shares in December 1923, and that the certificates evidencing this were in his name for ten years, when they were canceled pursuant to the resolution of the company reducing the stock, and a new certificate, No. 22 for 125 shares, was issued in plaintiff's name. Apparently there is no dispute as to this. The stock book further shows that in March, 1928, plaintiff individually became the owner of additional shares, which were standing in his name for five years when the capital stock was reduced and his certificate was exchanged for certificate No. 23 for 125 shares. It is this certificate which was held not to belong to him individually.

Plaintiff testified that these shares were gifts from his father and there is no evidence in denial. Moreover, the stock record of the leather company shows that from March, 1929, George Huch executed an income tax return, under oath, stating that

in the administration of a trust. Wright v. Wright, 74 Ill.

147; Wright v. Wright, 200 Ill. 116. The chancellor in

dismissing the complaint deprived plaintiff of the right to have the advice and consideration of the court as to this plan and left all the parties in interest in a better position than they were prior to the filing of the complaint. "Doubts of equity will assist

trustees and protect them in the due performance of the trust

whenever they seek the aid and direction of the court as to the establishment, the management or the execution of it." (2 Story's Rep. 707, 13th ed.) It was error to dismiss the complaint.

The master, approved by the chancellor, found that Louis L.

Hugh did not own, individually, certificate No. 22 for 100 shares of stock of the last company, but found that he owned the same as trustee. This conclusion is not supported by the evidence. The

stock book of the company shows that plaintiff owned a substantial

number of shares in December 1923, and that the certificate

evidencing this was in his name for ten years, when they were

cancelled pursuant to the resolution of the company reducing the

stock, and a new certificate, No. 22 for 100 shares, was issued

in plaintiff's name. Apparently there is no dispute as to this. The

stock book further shows that in March, 1928, plaintiff individually

became the owner of additional shares, which were standing in his

name for five years when the capital stock was reduced and his

certificate was exchanged for certificate No. 22 for 100 shares.

It is this certificate which was held not to belong to him

individually.

Plaintiff testified that these shares were gifts from his

father and there is no evidence in denial. Moreover, the stock

record of the last company shows that from March, 1923, George

Hugh executed an income tax return, under oath, stating that

6.

plaintiff was the owner of 1499 shares, which was the number of shares plaintiff claimed to own before the stock reduction. This is only one share less than one-half of all the shares. This statement was repeated by George Huch under oath in 1931 and 1932. In January, 1933, again George Huch signed new certificates, Nos. 22 and 23 to plaintiff for 249 shares, and this was repeated under oath in March, 1933. In the note for \$10,000 of George Huch to Gale it was recited that certificate No. 23 for 125 shares of stock issued to plaintiff and by him endorsed, was deposited with the Gale trustee as part of the collateral secured for the payment of this note. Plaintiff testified that he gave this certificate for 125 shares to pledge with Gale because his father requested it; that he and his father "worked hand in hand * * * I just handed it over to him without any question whatsoever." The decree erred in finding that this certificate of stock was not owned by Louis Huch individually.

The decree entered judgment against plaintiff individually in favor of Josephine Huch for \$2,600 as damages for his alleged failure to have a widow's award allowed in the Probate court in the estate of George Huch, of which plaintiff was executor. Section 178 of the Probate Act (ch. 3, par.330) provides that appraisers appointed by the court shall determine the amount of the widow's award. This duty is not upon an executor. Moreover, the evidence shows that for over six years Mrs. Huch accepted without complaint the \$50 per week which her son arranged to be paid to her. A widow's award may be waived. Howe v. Brown, 287 Ill. 532, 541, and her receipt of these payments might well have been considered to be a waiver by her. Also, the record shows that her widow's award has been allowed by the Probate court to the amount of \$2,600, which was found by the report of the appraisers to be a proper amount of the widow's award.

It is also pertinent to this item to note that intervenor, Alfred Jacobshagen, who acquired all of the interest in the trust estate of the daughter, Florence Wickersheim, claims that the amount paid by plaintiff to his mother, Josephine Huch, was in excess of the

plaintiff was the owner of 14 1/2 shares, which was the number of shares plaintiff claimed to own before the stock reduction. This is only one share less than one-half of all the shares. This statement was repeated by George Huch under oath in 1931 and 1932. In January, 1933, again George Huch signed new certificate, Nos. 22 and 23 to plaintiff for 249 shares, and this was repeated under oath in March, 1933. In the note for \$10,000 of George Huch to Gale it was recited that certificate No. 22 for 148 shares of stock issued to plaintiff and by him endorsed, was deposited with the trustee as part of the collateral security for the payment of this note. Plaintiff testified that he gave this certificate for 148 shares to pledge with Gale because his father requested it; that he and his father "worked hard in hand * * * I just handed it over to him without any question whatsoever." The decree erred in finding that this certificate of stock was not owned by Louis Huch individually. The decree entered judgment against plaintiff individually in favor of Josephine Huch for \$2,600 as damages for his alleged failure to have a widow's award allowed in the Probate court in the estate of George Huch, of which plaintiff was executor. Section 178 of the Probate Act (Ch. 3, par. 380) provides that appraisers appointed by the court shall determine the amount of the widow's award. This duty is not upon an executor. Moreover, the evidence shows that for over six years A. Huch accepted without complaint the \$30 per week which her son arranged to be paid to her. A widow's award may be waived. Hove v. Brown, 237 Ill. 532, 541, and her receipt of these payments might all have been considered to be a waiver by her. Also, the record shows that her widow's award had been allowed by the Probate court to the amount of \$2,600, which was found by the report of the appraisers to be a proper amount of the widow's award. It is also pertinent to this item to note that intervenor, Alfred Jacobshagen, who admitted all of the interest in the trust estate of the daughter, Florence Wiskersheim, claims that the amount paid by plaintiff to his mother, Josephine Huch, was in excess of the

7.

amount to which she is entitled under the terms of the will creating the trust, and that she is indebted to the leather company, and he asks for an accounting in this respect.

George Huch borrowed from his wife \$1,000, giving her two notes of \$500 each; she filed no claim in the Probate court on these notes but had a conversation with plaintiff with reference to them. Several witnesses testified to this, but agreed in substance that plaintiff said he had no money in the estate at that time and could not pay them, and there is undisputed evidence that at the time of this conversation, which took place about two months after the death of George Huch, there was no money in the estate. Based upon this evidence it was error to find that plaintiff falsely represented to Josephine Huch that there were no assets in the estate with which to pay these claims. There were assets but no cash at the time when Josephine Huch asked for payment, and there is no evidence that she was persuaded through any false statements not to file any claim in the Probate court against the estate. In Smith v. Smith, 206 Ill. App. 239, the court held that even if a claimant was misled by wrong advice of counsel this did not excuse the failure to file a claim within a year.

There was no sufficient reason presented for the removal of Louis J. Huch as trustee. Plaintiff had been employed by the leather company from the time he was approximately 17 years of age, or the year 1915; he had worked in all phases of the business during the time his father owned only one-half and the Gale interests the other half of the business, and also after his father had acquired all the stock; he was elected vice-president in 1920 and also acted as president while his father, who was a cripple for nearly 30 years, was away. In 1932 plaintiff was an equal stockholder with his father and drawing the same salary. The corporation at that time carried \$50,000 of life insurance on the life of plaintiff, and in 1927

amount to which she is entitled under the terms of the will creating the trust, and that she is indebted to the leather company, and he asks for an accounting in this respect.

George Huch borrowed from his wife \$1,000, giving her two notes of \$500 each; she filed no claim in the Probate court on these notes but had a conversation with plaintiff with reference to them. Several witnesses testified to this, but agreed in substance that plaintiff said he had no money in the estate at that time and could not pay them, and there is undisputed evidence that at the time of this conversation, which took place about two months after the death of George Huch, there was no money in the estate. Based upon this evidence it was error to find that plaintiff falsely represented to Josephine Huch that there were no assets in the estate with which to pay these claims. There were assets but no cash at the time when Josephine Huch asked for payment, and there is no evidence that she was persuaded through any false statements not to file any claim in the Probate court against the estate. In Smith v. Smith, 208 Ill. App. 339, the court held that even if a claimant was misled by wrong advice of counsel this did not excuse the failure to file a claim within a year.

There was no sufficient reason presented for the removal of Louis J. Huch as trustee. Plaintiff had been employed by the leather company from the time he was approximately 17 years of age, or the year 1915; he had worked in all phases of the business during the time his father owned only one-half and the sole interests the other half of the business, and also after his father had acquired all the stock; he was elected vice-president in 1920 and also acted as president while his father, who was a cripple for nearly 30 years, was away. In 1922 plaintiff was an equal stockholder with his father and drawing the same salary. The corporation at that time carried \$50,000 of life insurance on the life of plaintiff, and in 1927

8.

when George Huch drew his will he gave plaintiff complete powers with reference to management, sales and settlement of claims, and after plaintiff became president he reversed the business from a loss to a profit. This is more or less a family disagreement, largely growing out of plaintiff's dislike of his sister's husband. Such quarrels are not sufficient ground for the removal of a trustee. Wylie v. Bushnell, 277 Ill. 484, 505; Lorenz v. Weller, 267 Ill. 230.

The court should not have removed plaintiff as trustee, but it was also error to appoint Charles E. Byrne as successor trustee. The will creating the trust ordered that upon the failure of Louis Huch to perform the duties of trustee the National Bank of the Republic of Chicago or its successors should be appointed trustee. In the brief for the defendants it is stated that the National Bank of the Republic is out of existence. There is nothing in the record to show this, but even if true the will provided that its successor should be appointed trustee. The brief filed on behalf of plaintiff disclaims any criticism of Mr. Byrne.

We now consider the brief filed on behalf of the intervenor, Alfred Jacobshagen. By leave of court he was permitted to file his intervening petition in which he asserted (and it is not contradicted) that on or about February 13, 1941, he became the holder by purchase of all of the right, title and interest of Florence Wickersheim in and to the trust created by the will of George Huch, deceased. In his brief counsel for the intervenor, with one exception, supports the conduct of the plaintiff in the administration of his trust. He argues, as does plaintiff's counsel, that Louis Huch acted in good faith as president of the leather company and that no ground exists for his removal as trustee. He asserts, however, contrary to the claim of counsel for Mrs. Huch, that the trustee has overpaid her and that she is therefore indebted to the corporation. He asks that the decree be reversed in part and the cause be remanded with directions to take an accounting as to the amount received by Mrs. Huch. To this plaintiff makes the sufficient reply that all of the

when George Bush died his will gave his estate to his wife, with reference to management, sales and disposition of assets, and after plaintiff became president he reversed the business from loss to a profit. This is more or less a family disbursement, largely growing out of plaintiff's dislike of his sister's husband, such disbursements are not sufficient ground for the removal of a trustee.

Wylie v. Bushnell, 227 Ill. 484, 608; Leahy v. Leahy, 107 Ill. 100. The court should not have removed plaintiff as trustee, but it was also error to appoint Charles A. Byrne an associate trustee. The will creating the trust ordered that upon the failure of Louis Bush to perform the duties of trustee the National Bank of the Republic of Chicago or its successors should be appointed trustee. In the brief for the defendant it is stated that the National Bank of the Republic is out of existence. There is nothing in the record to show this, but even if true the will provided that its successors should be appointed trustee. The brief filed on behalf of plaintiff discloses any criticism of Mr. Byrne.

It now remains the brief filed on behalf of the intervenor, Alfred Jacobson. By law of court he was permitted to file his intervening petition in which he asserted (and it is not controverted) that on or about February 13, 1941, he became the holder of a power of attorney, title and interest of Florence Bush which is and to the trust created by the will of George Bush, deceased. In his brief counsel for the intervenor, with one exception, assumes the conduct of the plaintiff in the liquidation of his trust. It argues, as does plaintiff's counsel, that Louis Bush acted in good faith as president of the intervenor company and that no fraud exists for his removal as trustee. He asserts, however, contrary to the claim of counsel for the intervenor, that the trustee has oversteered and that the intervenor is liable to the corporation. He says that the decree he provided in 1941 was the one to be returned with directions to take an accounting as to the amount received by the Bush. To this plaintiff makes no sufficient reply that all of the

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funds paid Mrs. Huch were pursuant to resolutions of the directors of the leather company in August, 1934, and in January and May, 1935. Jacobshagen did not acquire any interest in the trust estate until February 1941, and therefore he was not affected by anything that happened before he acquired his interest. See Babcock v. Farwell, 146 Ill. App. 307, 335, where it was held that one cannot complain of corporate acts done prior to his becoming a stockholder, as he is presumed to have become a stockholder with knowledge of conditions existing at the time of his purchase.

A further sufficient point is that the intervenor has not filed any cross-appeal from the decree and therefore cannot seek a reversal. Forest Preserve District v. Chilvers, 344 Ill. 573; Marks v. Pope, 289 Ill. App. 558, 574.

To note all the many points made in the defendants' brief would unduly extend this opinion. We have indicated only the affirmative reasons for our conclusion.

For the reasons indicated the decree is reversed and the cause is remanded for further proceedings consistent with what we have said.

REVERSED AND REMANDED.

Matchett, P.J., and O'Connor, J. concur.

funds paid to which were our means to resolutions of the directors of the latter company in August, 1944, and in January and May, 1955. Jacobson did not acquire any interest in the trust assets until February 1941, and therefore he was not affected by anything that happened before he acquired his interest. See Jacobson v. Bell, 148 Ill. App. 307, 308, where it was held that the sale of corporate assets does not prior to his becoming a shareholder, so he is presumed to have become a shareholder with knowledge of conditions existing at the time of his purchase.

A further sufficient point is that the intervenor has not filed any cross-appeal from the decree and therefore cannot seek a reversal. Forest Preserve District v. Chicago, 344 Ill. 575; Wells v. Wells, 339 Ill. App. 588, 594.

To note all the many points made in the intervenor's brief would unduly extend this opinion. We have indicated only the alternative reasons for our conclusion. For the reasons indicated the decree is reversed and the cause is remanded for further proceedings consistent with what we have said.

REVEREND AND HONORABLE

Mathews, P.J., and Conover, J. concur.

42143

GEORGE C. LAGERSTROM, Administrator
of the Estate of George A. Lagerstrom,
Deceased,

Appellant,

vs.

EDWIN JAGO and MRS. O. JAGO,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

31014.156

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff as administrator brought suit for damages, alleging that the death of his intestate was caused by the negligence of defendant Edwin Jago while driving an automobile in which Mrs. Jago, the owner, was also an occupant. At the close of the evidence for the plaintiff the court instructed the jury to return a verdict for the defendants, and plaintiff appeals.

At the time of the accident the deceased, George A. Lagerstrom, was a child six years of age; he was struck by the automobile as it was going west on Addison street, at or near the cross-walk of Rutherford street, which runs into Addison from the south; Rutherford does not at this point run north of Addison; there are sidewalks on both the north and south sides of Addison.

The sole reason stated by the trial court for instructing for the defendants was that he did not believe there was any evidence "showing that degree of care that a child of the age of six should use crossing the street, even at the cross-walk." This was erroneous, for it has been repeatedly held that "up to the age of seven years 'a child is incapable of such conduct as will constitute contributory negligence...' " Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, 427; Illinois Central R. Co. v. Jernigan, 198 Ill. 297; Richardson v. Nelson, 221 Ill. 254; Maskellunas v. C.W.I.R. Co. 318 Ill. 142. The trial court said that he was following the decision in Roberts v. City of Rockford, 296 Ill. App. 469. In that case there was uncontradicted evidence that the child ran directly in

GEORGE C. J. GARDNER, Administrator
of the Estate of George A. Gardner,
Deceased,

Appellant,

vs.

EDWIN JAGO and Mrs. O. JAGO,
Appellees.

APPEAL FROM
CIRCUIT COURT,
OF COVINGTON COUNTY.

JUSTICE MEMORANDUM DELIVERED THE 11TH DAY OF MARCH, 1924.

Plaintiff as administrator proclaims suit for damages,

alleging that the death of his intestate was caused by the negligence of defendant Edwin Jago while driving an automobile in which Mrs. Jago, the owner, was also an occupant. At the close of the evidence for the plaintiff the court instructed the jury to return a verdict for the defendants, and plaintiff appeals.

At the time of the accident the deceased, George A. Gardner, was a child six years of age; he was struck by the automobile as it was going west on Addison street, at or near the cross-walk of Rutherford street, which runs into Addison from the south; Rutherford does not at this point run north of Addison; there are sidewalks on both the north and south sides of Addison.

The sole reason stated by the trial court for instructing for the defendants was that he did not believe there was any evidence "showing that degree of care that a child of the age of six can use in crossing the street, even at the cross-walk." This was erroneous, for it has been repeatedly held that "up to the age of seven years a child is incapable of such conduct as will constitute contributory negligence..." Chicago City Ry. Co. v. Toopy, 182 Ill. 410, 427; Illinois Central R. Co. v. J. J. J. J., 186 Ill. 227; Richardson v. J. J. J., 181 Ill. 254; Mackalinnas v. O. & N. Ry. Co., 318 Ill. 122. The trial court said that he was following the decision in Roberts v. City of Rockford, 186 Ill. App. 482. In that case there was uncontradicted evidence that the child ran directly in

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front of the oncoming truck, and moreover, that was not a case involving a direction to the jury, for the trial was before the court without a jury.

The defendant argues that there was no evidence that the automobile was negligently and carelessly driven without a proper lookout ahead or at a dangerous rate of speed, or that defendants negligently failed to yield the right-of-way to plaintiff's intestate as he was crossing at the street intersection, as was alleged in plaintiff's complaint.

The accident happened about 6 p.m. on September 2, 1939, when it was still light; the pavement was dry; there is a painted white line down the center of Addison street, which runs east and west; the mother of the child saw him in front of his nearby home about five minutes before the accident; he was then carrying a little kitten; she testified that he had always been instructed never to go into the street. He was seen by another witness on the sidewalk on the south side of Addison and going east. This witness testified that he heard no horn sounded in warning but heard the sound of tires skidding on the street and saw the west bound car standing on the north side of the center line of Addison and some 15 to 20 feet beyond the west cross-walk of Rutherford, and the child lying unconscious on the parkway; there were blood spots at the cross-walk and also in front of the automobile; also some glass near the cross-walk; there were skid marks on Addison about 50 to 60 feet long, starting east of the east cross-walk of Rutherford.

A police officer testified he had examined the skid marks on Addison, which were 57 feet in length; that the front headlight of the automobile was broken and there was a blood stain on the pavement north of the center line of Addison and about even with the west cross-walk. This witness testified that in his judgment, based on the skid marks, the automobile was going about 30 miles an hour. Another

front of the oncoming truck, and moreover, that was not a case involving a direction to the jury, for the trial was before the

court without a jury.

The defendant argues that there was no evidence that the automobile was negligently and carelessly driven without a proper lookout ahead or at a dangerous rate of speed, or that defendant negligently failed to yield the right-of-way to plaintiff's interstate as he was crossing at the street intersection, as was alleged in plaintiff's complaint.

The accident happened about 5 p.m. on September 2, 1929, when it was still light; the pavement was dry; there is a painted white line down the center of Addison street, which runs east and west; the mother of the child was in front of his nursery house about five minutes before the accident; he was then carrying a little kitten; she testified that he had always been instructed never to go into the street. He was seen by another witness on the sidewalk on the south side of Addison and going east. This witness testified that he heard no horn sounded in warning but heard the sound of skidding on the street and saw the west bound car standing on the north side of the center line of Addison and some 15 to 20 feet beyond the west cross-walk of Northford, and the child lying unconscious on the highway; there were blood spots at the cross-walk and also in front of the automobile; also some glasses near the cross-walk; there were skid marks on Addison about 25 to 30 feet long, extending east of the east cross-walk of Northford.

A police officer testified he had examined the skid marks on Addison, which were 25 feet in length; that the front of the automobile was broken and there was a blood stain on the pavement north of the center line of Addison and about even with the west cross-walk. This witness testified that in his opinion, based on the skid marks, the automobile was going about 20 miles an hour, neither

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police officer testified as to the presence of the blood and glass and the skid marks. He tested the brakes on the automobile and testified that at 25 miles an hour he could stop it in 20 feet. There was other testimony to the same general effect.

From these facts it is argued that the child was crossing from the south to the north side of Addison in the west cross-walk of Rutherford and was over half way across the street when he was struck by the automobile, which had skidded some 57 feet, carrying or knocking him to a point 20 feet west of the west cross-walk of Rutherford where the second blood spot was found. These facts tended to support the charges of negligence made in plaintiff's complaint and should have been submitted to the jury for their consideration.

Defendants argue that plaintiff's case calls for an inference based upon another inference, and that the law will not permit this. This statement may have at one time received some support, but as Wigmore in his work on Evidence (2nd ed.) sec.41, says: "There is no such rule; nor can be." This author completely demolishes this myth, and numerous well considered opinions are to the same effect: notable Burns v. Prudential Ins. Co., 283 Ill. App. 442; Benny v. Goldblatt Bros. Inc., 298 Ill.App. 325; Plodzien v. Segool, 314 Ill. App. 40.

Plaintiff asks this court to pass upon what is said to be improper conduct in the trial on the part of counsel for defendants. This counsel apparently did go farther than was proper in his attempt to bring before the jury a written statement said to have been made by defendant Edwin Jago. Such a statement was self-serving and inadmissible, and the inquiry into its contents was an indirect method to bring it to the attention of the jury. Such conduct has been held to be reversible error in Bishop v. Chicago Junction Ry. Co., 280 Ill.63.

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It was also error for counsel for defendants to attempt to inject into the record, as authority, the contents of the United States Bureau of Standards, a hearsay statement as to what is the proper stopping distance of an automobile at various speeds.

For the error in peremptorily instructing the jury to find for the defendants, the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P.J., and O'Connor, J. concur.

It was also error for defendant to attempt to inject into the record, as authority, the contents of the affidavit of the State Bureau of Standards, a merely technical statement as to what is the proper stopping distance of an automobile at various speeds. For the error in peremptorily instructing the jury to find for the defendant, the judgment is reversed and the case is remanded for a new trial.

REVEREND AND HONORABLE

WATKINS, J., and O'CONNOR, J. concur.

RUTH L. MACABEE, a minor, by C. A. MACABEE and HAZEL MACABEE, her father and mother and next friends; and C.A. MACABEE,

Appellees.

vs.

RICHARD MILLER, trading as RICHARD MILLER AMUSEMENT DEVICES; CHARLES MILLER, trading as MILLER AMUSEMENT ENTERPRISES; and CHARLES MILLER and RICHARD MILLER, copartners, trading as RICHARD MILLER AMUSEMENT DEVICES and/or MILLER AMUSEMENT ENTERPRISES, Defendants.

RICHARD MILLER and CHARLES MILLER, Appellants.

316 I.A. 157

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

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MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Ruth L. Macabee, a minor, hereafter called plaintiff, by her next friends, brought suit against defendants seeking damages for injuries said to have been received while she was riding on one of defendants' amusement devices because of its negligent operation; the jury returned a verdict finding the defendants not guilty; the trial court allowed plaintiff's motion for a new trial; defendants sought and obtained leave of this court granting permission to appeal from this order and the question before us is the propriety of the trial court's order.

August 5, 1938, a street carnival was held in Highland Park, Illinois. An amusement device known as Loop-o-Plane was operated by defendant Charles Miller. The loop-o-plane consists of an upright column at the top of which is a horizontal axle/^{to} which is attached a rod or pole 16 feet long, which, when the device is at rest, is parallel to the column; at the lower end of this rod is a cab containing two seats back to back, each seat holding two people, or four persons in all; the cab and pole act as a pendulum and can be swung around the horizontal axle in a complete circle. After passengers were in the cab an operator would push the cab and start

RUTH L. GACOB, a minor, by D. A. GACOB and H. A. GACOB, her father and mother and next friends; and C. A. GACOB, Appellants.

vs.

RICHARD MILLER, trading as MILLER; WILLIAM MILLER, trading as MILLER; RICHARD MILLER, trading as MILLER; and OHM, trading as OHM; RICHARD MILLER, trading as MILLER; and/or MILLER, trading as MILLER. Defendants.

RICHARD MILLER and OHM, Appellants.

On June 1, 1938, a street carnival was held in Highland Park, Illinois. An amusement device known as Loop-the-Loop was operated by defendant Charles Miller. The loop-the-loop consisted of an upright column at the top of which is a horizontal axle which is supported by a rod or pole 16 feet long, which, when the device is in rest, is parallel to the column; at the lower end of this rod is a cap containing two seats back to back, each seat holding two persons, four persons in all; the cap and pole act as a pendulum and are swung around the horizontal axle in a complete circle. As the passengers were in the cap and the operator could push the cap and seats

August 5, 1938, a street carnival was held in Highland Park, Illinois. An amusement device known as Loop-the-Loop was operated by defendant Charles Miller. The loop-the-loop consisted of an upright column at the top of which is a horizontal axle which is supported by a rod or pole 16 feet long, which, when the device is in rest, is parallel to the column; at the lower end of this rod is a cap containing two seats back to back, each seat holding two persons, four persons in all; the cap and pole act as a pendulum and are swung around the horizontal axle in a complete circle. As the passengers were in the cap and the operator could push the cap and seats

next friends, brought suit against defendants seeking damages for injuries said to have been received while on the riding on one of defendants' amusement devices because of its negligent operation; the jury returned a verdict finding the defendants not guilty; the trial court allowed plaintiff's motion for a new trial; defendants sought and obtained leave of this court granting permission to appeal from this order and the question before us is the propriety of the trial court's order.

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it swinging backward and forward; there is a 3 horsepower motor attached to the top of the ^{up}/right column which is geared to the pole attached to the cab; the motor was incapable of swinging the cab from its stationary position below to a vertical position above, as it could move the cab only a distance of two or three feet. When passengers got in the cab they were secured in their seats by a belt running from one side of the cab to the other, across their laps and hips; after the passengers were in the cab and strapped in the operator would push the cab and turn on the motor so as to swing the cab in the direction it had been pushed, for a distance of two or three feet, and as gravity would reverse the movement of the cab, swinging it in the other direction, the operator would reverse the motor thereby swinging the cab in the opposite direction; this would be repeated - the momentum and force of the motor continually swinging the cab further, first in one direction and then another like the pendulum of a clock, until finally the cab would swing up in a position vertically above the axle, at which time the passengers would be upside down, kept from falling out by the straps; when the cab was in this position the operator would apply a hand brake which would hold the cab in that inverted position for a moment or two and then it would be released and the cab permitted to swing down and back and forth gradually until it stopped.

Plaintiff sought to show negligence in the operation of this device by testimony of certain witnesses, including plaintiff, that when the cab was up in a vertical position and had started to swing downward and had gone about three feet, it was suddenly stopped and moved backward in the opposite direction, passing through the vertical position and then oscillating gradually to the bottom; that the "whole thing" and the braces were tilted over and the

it swinging backward and forward; there is a 3 horse-power motor attached to the top of the ^{up}right column which is geared to the pole attached to the cap; the motor is capable of swinging the cap from its stationary position below to a vertical position above, as it could move the cap only a distance of two or three feet. When passengers got in the cap they were secured in their seats by a belt running from one side of the cap to the other, across their laps and hips; after the passengers were in the cap and strapped in the operator would push the cap and turn on the motor so as to swing the cap in the direction it had been pushed, for a distance of two or three feet, and as gravity would reverse the movement of the cap, swinging it in the other direction, the operator would reverse the motor thereby swinging the cap in the opposite direction; this would be repeated - the momentum and force of the motor continually swinging the cap further, first in one direction and then another like the pendulum of a clock, until finally the cap would swing up in a position vertically above the axle, at which time the passengers would be upside down, safe from falling out by the straps; when the cap was in this position the operator would apply a hand brake which would hold the cap in that inverted position for a moment or two and then it would be released and the cap permitted to swing down and back and forth gradually until it stopped.

Plaintiff sought to show negligence in the operation of this device by testimony of certain witnesses, including plaintiff, that when the cap was up in a vertical position and had started to swing downward and had gone about three feet, it was suddenly stopped and moved backward in the opposite direction, passing through the vertical position and then oscillating gradually to the bottom; that the "whole thing" and the braces were tilted over and the

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platform upon which the device rested was raised from the ground about 3 or 4 inches. Plaintiff claims that when the cab stopped there was a sudden jerk that injured her spine, and for this damages were sought.

Defendants introduced testimony tending to show that the device operated in the usual manner and that there was no sudden stoppage or jerk as described by plaintiff; also medical testimony tending to show that plaintiff had a compression of the 4th lumbar vertebra resulting from a tumor which had been present probably not less than a year before the instant occurrence.

Plaintiff was at this time an active girl 14 years of age, above the average in intelligence; she, with a girl friend and two young men, went to the carnival together; they rode upon a device called a Tilt-a-Whirl and then went to the loop-o-plane and watched it operate for some time; plaintiff and her girl friend became passengers, entering the cab; two young men (not the escorts of plaintiff and her friend) occupied the other two seats of the cab; these young men were not witnesses at the trial. The boys who had accompanied the girls to the carnival did not take the ride but stood^{by}/watching it operate.

Plaintiff and her girl friend and the young men escorting them testified that the cab suddenly jerked back in the opposite direction just as it had left the vertical position and had moved about three feet. However, the testimony of one of the young men and the girl friend of the plaintiff was weakened by the introduction of statements they had made shortly after the accident, signed by them, in ~~which~~ which they said that the device operated normally and no mention was made of any jerking.

The operator of the device testified that there was no jerk in the operation of the device and that it worked normally and in the usual manner. There was testimony of others, including an expert electrical engineer, that it was a physical possibility for the device to jerk in the manner described

Platters upon which the device rested was raised from the ground about 5 or 6 inches. Plaintiff claimed that when the device started was a sudden jerk that injured her spine, and that this was the cause of her injury.

Plaintiff introduced testimony tending to show that the device operated in the usual manner and that there was no sudden jerk or jolt as described by Plaintiff; also testimony tending to show that Plaintiff had a contusion of the fifth lumbar vertebra resulting from a tumor which had been present probably not less than a year before the instant occurrence.

Plaintiff was at the time an active girl 14 years of age, above the average in intelligence; she, with a girl friend and two young men, went to the carnival together; they were with a device called a Tilt-a-whirl and when they went to the Tilt-a-whirl and when it operated for some time; Plaintiff and her girl friend became passengers, entering the cab; the young man (and the account of Plaintiff and her friend) accused the other two seats of the cab; these young men were not witnesses at the trial. The boys who had accompanied the girls to the carnival did not take the ride but stood watching it operate.

Plaintiff and her girl friend and the two young men testified that the cab suddenly tilted back in the opposite direction just as it had left the vertical position and was moving about three feet, however, the testimony of one of the young men and the girl friend of the Plaintiff was contradicted by the introduction of statements they had made shortly after the accident, signed by them, in which they said that the device operated normally and no sudden jerk or jolt was felt.

Plaintiff testified that there was no sudden jerk or jolt when the device started, and that it worked normally. The testimony of Plaintiff and the other witnesses, including the two young men, was to the effect that it was a physical injury to the spine, and that it was a physical injury to the spine, and that it was a physical injury to the spine.

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by plaintiff and her witnesses. The expert explained in considerable detail, giving measurements and weight in support of his opinion that, if the cab was stopped two or three feet after it had left the vertical position, the motor was not sufficiently strong to pull it back into the reverse motion. Whether the ^{apparatus} ~~apparatus~~ operated in the normal/^{manner} ~~xxxx~~, without any jerk or unusual movement, was a question of fact for the consideration of the jury, which indicated by their verdict that in their opinion the operation of the device at the time and place in question was normal and as usual.

The trial court gave as his reasons for granting a new trial, first, that he was of the opinion that an instruction given at the request of the defendants was reversible error. This instruction is as follows:

"If you find from a preponderance of the evidence that before the plaintiff, Ruth Macabee, entered the loop-o-plane in question she had seen it operate and thereby became familiar with the manner in which it was so operated, and if you further find from a preponderance of the evidence that as a result of the plaintiff having seen said loop-o-plane operate she knew, or in the exercise of reasonable care for one of her age and intelligence, should have known of all natural risks arising out of a ride in said loop-o-plane, then upon entering said loop-o-plane under such circumstances, she assumed all normal risks arising out of the usual operation thereof, and if you further find that at the time the plaintiff was in the loop-o-plane it operated in the usual manner and as she had previously observed, then you should find the defendants not guilty."

The court was of the opinion that the assumption of risk doctrine applied only where there was a contractual relation or relationship of master and servant, and that this was not present in the instant case. And plaintiff asserts in her brief that the doctrine of assumption of risk never applies except where there is the relationship of master and servant. This view is erroneous. There was a contractual relation here when plaintiff paid the fee for permission to ride on the loop-o-plane. What we said in Murphy v. White City Amusement Co., 242 Ill. App. 56, is in point, where we held that while the relation there between plaintiff and defendant may have been that of passenger and carrier, yet the relative duties of the parties

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by Plaintiff and her witnesses. The expert evidence is contradictory in detail, giving testimony and stating in support of the opinion that, if the cab was stopped two or three feet after it had left the vertical position, the motor was not sufficiently strong to pull it back into the reverse motion. Whether the xxxxxxxx apparatus in the normal xxxxxx, without any jerk or unusual movement, was a question of fact for the consideration of the jury, which indicated by their verdict that in their opinion the operation of the device at the time and place in question was normal and as usual. The trial court gave as his reasons for granting a new trial, first, that he was of the opinion that an instruction given at the request of the defendants was reversible error. This instruction is as follows:

"If you find from a preponderance of the evidence that before the plaintiff, with her eyes closed, entered the loop-plane in question he had seen it operate and thereby became familiar with the manner in which it was so operated, and if you further find from a preponderance of the evidence that as a result of the plaintiff having seen said loop-plane operate and know, or in the exercise of reasonable care, persons of her age and intelligence, should have known of all natural risks attending out of a ride in said loop-plane, then upon entering said loop-plane under such circumstances, she assumed all normal risks attending out of the usual operation thereof, and if you further find that at the time the plaintiff was in the loop-plane it operated in the usual manner and as she had previously observed, then you should find the defendants not guilty."

The court was of the opinion that the exception of such doctrine applied only where there was a contractual relation or a relationship of master and servant, and that this was not present in the instant case. And plaintiff asserts in her brief that the doctrine of assumption of risk never applies except where there is the relationship of master and servant. This view is erroneous. There was a contractual relation here when plaintiff paid the two tickets to ride on the loop-plane. That is held in Wright v. Union City Amusement Co., 115 App. 2d, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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depend upon the kind of carriage contracted for. In Olsen v. Riverview Park Co., 252 Ill.App. (abst.) 638, which involved an accident while plaintiff was riding on a circular railway, the court said: "When persons contract for a ride on these devices, such as are commonly in our amusement parks, they do so with the knowledge that there is more or less danger in the experience. That is one of the sources of attraction." In Stickel v. Riverview Sharpshooters Park Co., 159 Ill.App. 110,116, a case involving injuries incurred on an amusement device, it was held that the question of assumption of risk was for the jury to determine. Many other cases support this proposition.

The instruction under consideration told the jury, among other things, that plaintiff "assumed all normal risks arising out of the usual operation thereof, and if you further find that at the time the plaintiff was in the loop-o-lane it operated in the usual manner and as she had previously observed, then you should find the defendants not guilty." Cases said to be to the contrary can be readily distinguished from those above cited. We are of the opinion that the instruction stated the law and was properly given to the jury.

The court also gave as a reason for granting a new trial the refusal to admit in evidence an answer first filed by Richard Miller, a defendant. His original answer, not sworn to, admitted the ownership and operation of the loop-o-plane device; subsequently Richard Miller moved to be permitted to file an amended answer in which he denied operation or ownership of the device; this motion was supported by an affidavit of the attorney who drew the original answer to the effect that the admission of the allegations of ownership and operation by Richard Miller was made in error, without the knowledge or authority of Richard Miller, and was contrary to the facts. The motion was allowed and the amended answer was

depend upon the kind of carriage contracted for. In Lang v. Riverdale Park Co., 222 Ill.App. (2d) 632, which involved an accident while plaintiff was riding on a circular railway, the court said: "When persons contract for a ride on these devices, such as are commonly in our amusement parks, they do so with the knowledge that there is more or less danger in the experience. That is one of the sources of attraction." In Stichel v. Riverdale Park Co., 159 Ill.App. 110, 116, a case involving injuries incurred on an amusement device, it was held that the question of assumption of risk was for the jury to determine. Many other cases support this proposition.

The instruction under consideration told the jury, among other things, that plaintiff "assumed all normal risks arising out of the usual operation thereof, and if you further find that at the time the plaintiff was in the loop--lane it operated in the usual manner and as she had previously operated, then you should find the defendants not guilty." Cases said to be to the contrary can be readily distinguished from those above cited. We are of the opinion that the instruction stated the law and was properly given to the jury.

The court also gave as a reason for granting a new trial the refusal to admit in evidence an answer first filed by Richard Miller, a defendant. His original answer, not sworn to, admitted the ownership and operation of the loop-o-plane device; subsequently Richard Miller moved to be permitted to file an amended answer in which he denied operation or ownership of the device; this motion was supported by an affidavit of the attorney who filed the original answer to the effect that the admission of the allegations of ownership and operation by Richard Miller was made in error, after out the knowledge or authority of Richard Miller, and was contrary to the facts. The motion was allowed and the amended answer was

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filed. The court properly excluded the original answer of Richard Miller. In Bennett v. Auditorium Bldg. Corp., 299 Ill.App. 139, we held that an allegation in one of the counts of an original complaint should have been admitted in evidence as this count was never supplanted in any way nor contradicted in any manner, and we properly assumed that plaintiff advised her attorneys of the facts when this original count was filed. See also Niederle v. Chicago R. T. Co., 264 Ill.App. 347, and Linn v. Clark., 295 Ill. 22. The facts in the instant case are quite different. Where it appears that a pleading is filed which misstates facts, and new pleadings are substituted, the assumption that the first pleading was authorized vanishes. In Wenegar v. Bollenbach, 180 Ill. 222, is an extended discussion of this question and the opinion concludes that where such pleading is not sworn to by the party and it is prepared by his attorney under a misapprehension of the facts, as shown by evidence, "such original unsworn pleading ought not to be admitted in evidence against the pleader." Other cases are to the same effect. But in any event when the jury found that Charles Miller, admittedly the owner and operator of the device, was not guilty, it would follow as a matter of course that Richard Miller was also not guilty.

Defendants argue that the court committed reversible error in excluding two letters by certain insurance brokers, who are not parties to the suit or agents of the defendants, or witnesses. The defendants offered them upon the theory that they threw some light on the alleged ownership of Richard Miller, but this was immaterial in view of the verdict of the jury.

We cannot approve of the brief filed on behalf of the defendants, where approximately 160 cases are cited in support of substantially one proposition. Such a barrage is unnecessary.

filed. The court properly excluded the original letter of Richard Miller. In Bennett v. Bennett, 111 App. 138, we held that an affidavit is not an original complaint should have been admitted in evidence as this court was never excluded in any way not contradicted in any manner, and we properly assumed that plaintiff advised her attorneys of the facts when this original count was filed. See also Niederger v. Chicago R. & Co., 234 Ill. App. 347, and Linn v. Linn, 235 Ill. 22. The facts in the instant case are quite different, however, it appears that a pleading is filed which misstates facts, and new pleadings are substituted, the assumption that the first pleading was authorized vanishes. In Wagner v. Bollinger, 180 Ill. 323, is an extended discussion of this question and the opinion concludes that where such pleading is not shown to be the party's and it is prepared by his attorney under a misrepresentation of the facts, as shown by evidence, "such original answers pleading ought not to be admitted in evidence against the pleader." Other cases are to the same effect. Not in any event when the jury found that Charles Miller, admittedly the owner and operator of the device, was not guilty, it would follow as a matter of course that Richard Miller was also not guilty.

Defendants argue that the court committed reversible error in excluding two letters by certain insurance brokers, who are not parties to the suit or agents of the defendants, or witnesses. The defendants offered them upon the theory that they threw some light on the alleged ownership of Richard Miller, and this was immaterial in view of the verdict of the jury. We cannot approve of the brief filed on behalf of the defendants, where approximately 100 cases are cited in support of substantially one proposition, such a practice is unnecessary.

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We cannot say that the verdict of the jury was contrary to the weight of the evidence. We find no reversible errors upon the trial. The order of the trial court granting a new trial is therefore reversed and the cause is remanded with directions to enter a judgment upon the verdict returned.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P.J., and O'Connor, J. concur.

It cannot say that the verdict of the jury was contrary to the weight of the evidence. It did no reversible error upon the trial. The order of the trial court granting a new trial is therefore reversed and the cause is remanded with directions to enter a judgment upon the verdict returned.

REVEREND AND HONORABLE JUDGE OF THE COURT.

WATSON, P. J., and O'CONNOR, J. concur.

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L. J. BERC, et al.,

v.

KAROLINA KRZYSTOFF, FRANK
KRZYSTOFF, FRANK NEDESPIEL and
JAMES KARBAN & COMPANY, a Cor-
poration.

FRANK NEDESPIEL,
Appellee,

v.

JAMES KARBAN & COMPANY,
Appellant.

316 I.A. 157

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

L. J. Berc filed his complaint in the nature of a creditor's bill against Karolina Krzystoff, Frank Krzystoff, her husband, and Frank Nedespiel, the son of Karolina by a former marriage, by which he sought to subject 5 parcels of real estate to the payment of a judgment he had obtained against Karolina Krzystoff and Frank Krzystoff, which real estate he alleged had been fraudulently conveyed, without consideration, to defendant, Frank Nedespiel. The prayer was that the conveyance be adjudged void as against plaintiff. Afterwards a petition was filed by other judgment creditors and they were made co-plaintiffs. Some time afterward, by leave of court, plaintiff amended his complaint by alleging he was informed and believed that James Karban & Company, a corporation, has or claims to have, some interest in the premises which is subordinate to the lien of the judgment.

Defendants Karolina Krzystoff and Frank, her husband, filed their answer denying that the conveyance by them to defendant, Frank Nedespiel, was made with the intention of defrauding complainant and other creditors but alleged it was made in good faith and for a valuable consideration. They also averred that two trust

L. J. BARE, et al.,

v.

KAROLINA KRISTOFF, FRANK
KRISTOFF, FRANK KRISTOFF and
JAMES KRISTOFF & COMPANY, a cor-
poration,

FRANK KRISTOFF,

Appellee,

v.

JAMES KRISTOFF & COMPANY,
Appellant.

RECEIVED BY THE CLERK OF THE COURT.

L. J. Bare filed his complaint in the nature of a creditor's

bill against Karolina Kristoff, Frank Kristoff, her husband,

and Frank Nedegiel, the son of Karolina by a former marriage, by

which he sought to subject a parcel of real estate to the payment

of a judgment he had obtained against Karolina Kristoff and

Frank Kristoff, which real estate he alleged had been fraudulently

conveyed, without consideration, to defendant, Frank Nedegiel.

The prayer was that the conveyance be adjudged void as against

plaintiff. Afterward a petition was filed by other judgment

creditors and they were made co-plaintiffs. Some time afterward,

by leave of court, plaintiff amended his complaint by alleging

he was informed and believed that James Kristoff & Company, a corpora-

tion, has or has to have, some interest in the premises which is

subordinate to the lien of the judgment.

Defendants Karolina Kristoff and Frank, her husband, filed

their answer denying that the conveyance by them to defendant,

Frank Nedegiel, was made with the intention of defrauding cred-

itor and other creditors but alleged it was made in good faith

and for a valuable consideration. They also averred that two trust

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deeds which purported to convey the property claimed to be owned by defendant, James Karban & Co., were executed by them without any consideration; that one of the trust deeds and the note for \$2000 were executed by them in consideration of which Karban & Co. agreed to loan them \$2000 but they had never received any part of the loan; that the other trust deed which purported to secure an indebtedness of \$7,500 was represented by Karban & Co. to be an agreement extending the time of payment of an existing encumbrance of \$7,500 on the property, and that the trust deeds should be removed as clouds.

At the same time, defendant Frank Nedespiel, filed his answer and a counterclaim. In the answer he denied that the conveyances of the 5 pieces of property to him were mere shams intended to defraud the creditors of defendants, Karolina and Frank Krzystoff; and averred that the conveyances were made for a good and valuable consideration. In his counterclaim he alleged that defendant, James Karban & Co. had procured defendants, Karolina and Frank Krzystoff, to execute two trust deeds conveying the real estate in question, one of which purported to secure their indebtedness of \$2,000, and the other \$7,500, and alleged that the execution of the notes and trust deeds was without consideration, and prayed that they be decreed to be null and void, and removed as clouds from his title.

James Karban & Co. filed its answer to the complaint as amended alleging it had a lien on the real estate which was prior and superior to the lien of plaintiff, and denied that plaintiff was entitled to any relief. It filed its motion to dismiss the counterclaim of Frank Nedespiel. After this motion was filed, Frank Nedespiel amended his counterclaim in which he sets up more in detail the execution of the two trust deeds claimed to be owned by James Karban & Co.

Karban & Co.'s motion to strike was filed to the amended counterclaim and after a number of continuances, it was overruled. It filed its answer to the counterclaim in which it alleged that Frank was not in possession of the premises and that they were

deeds which purported to convey the property claimed to be owned by defendant, James Karban & Co., were executed by their witness and consideration; that one of the trust deeds and the note for \$20,000 were executed by them in consideration of which Karban & Co. agreed to loan them \$20,000 but they had never received any part of the loan; that the other trust deed which purported to secure an indebtedness of \$7,500 was represented by Karban & Co. to be an agreement extending the time of payment of an existing encumbrance of \$7,500 on the property, and that the trust deeds should be removed as clouds. At the same time, defendant Frank Nedegiel, filed his answer and a counterclaim. In the answer he denied that the conveyances of the 5 pieces of property to him were mere loans intended to defraud the creditors of defendants, Karolina and Frank Krzyzowski; and averred that the conveyances were made for a good and valuable consideration. In his counterclaim he alleged that defendant, James Karban & Co. had procured defendants, Karolina and Frank Krzyzowski, to execute two trust deeds conveying the real estate in question, one of which purported to secure their indebtedness of \$2,000, and the other \$7,500, and alleged that the execution of the notes and trust deeds was without consideration, and prayed that they be declared to be null and void, and removed as clouds from his title. James Karban & Co. filed the answer to the complaint as amended alleging it had a lien on the real estate which was prior and superior to the lien of plaintiff, and denied that plaintiff was entitled to any relief. It filed its motion to dismiss the counterclaim of Frank Nedegiel. After this motion was filed, Frank Nedegiel amended his counterclaim in which he set up more in detail the execution of the two trust deeds claimed to be owned by James Karban & Co. Karban & Co.'s motion to strike was filed to the amended counterclaim and after a number of continuances, it was overruled. It filed its answer to the counterclaim in which it alleged that Frank was not in possession of the premises and that they were

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not vacant and unoccupied, but were improved; that it was the holder of the notes secured by the two trust deeds; that they were executed for a valuable consideration; and averred that the subject matter of the counterclaim was not germane to the original suit.

Some months afterward, Karban & Co. filed an amended answer to the counterclaim setting up substantially the same matters as those in its original answer, except in more detail, but also averred that it had paid Frank and Karolina Krzystoff \$1,125 on account of the \$2,000 note secured by the trust deed, and that the trust deed was a prior lien on part of the real estate; that it was the legal owner and holder of the trust deed and "entitled to its reasonable solicitors' fees for obtaining counsel to represent it in this proceeding."

The case was tried before the court and July 22, 1941, the court entered two decrees, one on the complaint as amended and the other on the counterclaim. In the first it was decreed that the purported conveyance of the properties by Karolina and Frank Krzystoff to Frank Nedespiel were null and void and the record of them be vacated and expunged. It was further decreed that plaintiffs were entitled to a lien on the premises and that unless the amount due Bere on his judgment, viz., \$1,287.48, and the amount due the co-plaintiffs on their judgment \$5,404.03 were paid within 5 days, the property be sold by a master in chancery. The other decree entered on the counterclaim found and decreed that one of the trust deeds given to secure the \$7,500 was^{obtained} by James Karban & Co. a corporation, without consideration; and therefore was null and void and of no force. And it was decreed that the notes and the other trust deed, purporting to have been given to secure an indebtedness of \$2,000, which Karban & Co. had agreed to loan to Karolina and Frank Krzystoff (but which loan was never made) be cancelled and held for naught and removed as a cloud. The court then went on to find that between

not vacant and unoccupied, but were improved; that it was the holder of the notes secured by the trust deed; that they were executed for a valuable consideration; and that the subject matter of the count claim was not known to the original suit.

Some months afterwards, London & Co. filed an amended answer to the counterclaim asserting substantially the same facts as those in its original answer, except in some details, but also averred that it had paid Frank and Caroline Krzyzostoff \$115 on account of the \$2,000 note secured by the trust deed, and that the trust deed was a prior lien on part of the real estate; that it was the legal owner and holder of the trust deed and "entitled to its reasonable solicitors' fees for obtaining counsel to represent it in this proceeding."

The case was tried before the court and July 22, 1911, the court entered two decrees, one on the complaint as amended and the other on the counterclaim. In the first it was decreed that the purported conveyance of the properties by Caroline and Frank Krzyzostoff to Frank Kedespiel were null and void and the record of them be voided and expunged. It was further decreed that Caroline was entitled to a lien on the premises and that unless the amount due to her on their judgment \$5,404.03 were paid within 60 days, the property be sold by a master in chancery. The other decree entered on the counterclaim found and decreed that one of the trust deeds given to secure the \$7,500 loan by James Harben & Co. a corporation, without consideration; and therefore was null and void and of no force, and it was decreed that the notes and the other trust deeds, purporting to have been given to secure an indebtedness of \$1,000, which Harben & Co. had agreed to loan to Caroline and Frank Krzyzostoff (but which loan was never made) be cancelled and held for account and removed as a cloud. The court then went on to find that between

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the date of the execution of the \$2,000 note and trust deed, September 24, 1931, and December 19, 1931, Karban & Co. advanced to Karolina and Frank Krzystoff, \$300 and that in equity and good conscience, Karban & Co. was entitled to a lien on the real estate for \$300. It is from this last decree that Karban & Co. appeals and the issue raised by this trust deed is the only one before us since counsel say: "the trust deed and note for \$7,500 * * * were cancelled by Karban & Co. who procured a release deed executed by the Chicago Title & Trust Co., and the documents turned over to the Krzystoffs, immediately after the hearing of the case."

No briefs have been filed by any other party.

We have stated enough to show that the record is very much confused. The evidence is undisputed that Karban & Co. gave \$300 to Karolina and Frank Krzystoff on account of the \$2,000 note executed by them, but counsel for Karban & Co. contend that Karban & Co. paid out on account of this proposed loan \$1,125, and, as we understand counsels' argument, they contend Karban & Co. is entitled to this sum and to its solicitors' fees,

Upon a consideration of all the evidence, we are unable to say that the chancellor did not arrive at a rough sort of conclusion as to what Karban & Co. was entitled to. In McCabe v. Chicago & Northwestern R. R. Co., 215 Ill. App. 99, we quote with approval what the Lord Chancellor said in The Mediana, L. R. [1900] App.Cas. 113, in which it was held that the Board of Trustees of Mersey Docks and Harbors was entitled to substantial damages for the loss of the damaged lightship, and not merely nominal damages. We there quote what the Lord Chancellor said: "Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in the place of the jury, to consider what compensation in money shall be given for what is a wrongful act." He then considered a hypothetical case and

the date of the execution of the \$2,000 note and that deed, September 24, 1931, and December 17, 1931, and December 30, 1931, executed to Carolina and Frank Kravtsov, \$200 and that in equity and good conscience, Karman & Co. was entitled to a lien on the real estate for \$200. It is from this last decree that Karman & Co. appeals and the issue raised by this trust deed is the only one before us since counsel say: "the trust deed and note for \$2,000" were cancelled by Karman & Co. who procured a release and executed by the mortgagee Little & Trust Co., and the documents turned over to the Kravtsofs, immediately after the hearing of the same."

No briefs have been filed by any other party. We have stated enough to show that the record is very much continued. The evidence is undisputed that Karman & Co. gave \$200 to Kravtsov and Frank Kravtsov on account of the \$2,000 note executed by them, but counsel for Karman & Co. contend that Karman & Co. paid out on account of this proposed loan \$1,111, and, as we understand counsel's argument, they contend Karman & Co. is entitled to said sum and to its collector's fees.

Upon a consideration of all the evidence, we are unable to say that the Chancellor did not arrive at a sound basis of conclusion as to what Karman & Co. was entitled to. In Carroll v. Whelan, 100 Northwestern R. R. Co., 213 Ill. App. 2d, we dealt with a similar case. In that case the Lord Chancellor said in the opinion, 100 N.W. 2d, 113, in which it was held that the Board of Trustees of Lewis & Clark and Karman was entitled to substantial damages for the loss of the damaged ship, and not merely nominal damages. We have said that the Lord Chancellor said: "It is of course the hope of every man to lay down any principle upon which you can give damages; nevertheless it is limited to the jury, or those who stand in the place of the jury, to consider what compensation is fairly and properly given for what is a wrongful act." He then considered a hypothetical case and

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said: "and in that way they come to a rough sort of conclusion as to what damages ought to be paid." So, in the instant case, while \$300 was awarded Karban & Co. by the second decree, the two decrees, in substance and effect, were but one and the matter should have been disposed of in one decree, and we shall treat it as what, in reality/^{it}is, but one decree.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

aid: "and in that way they come to a rough sort of conclusion as to what damages ought to be paid." So, in the instant case, while \$200 was awarded Kaplan & Co. by the second decree, the two decrees, in substance and effect, were but one and the matter should have been disposed of in one decree, and we shall treat it as such, in reality, ^{it} but one decree.

The decree of the Circuit court of Cook county is affirmed.

DEFORE AFFIRMED.

Matchett, P.J., and McSweeney, J., concur.

42100

THE FLORSHEIM CORPORATION, a
Corporation,

Appellee,

vs.

DYNELL SPRING WATER COMPANY, a
Corporation, CHARLES A. COEY
and CARRIE G. COEY, doing bus-
iness as DYNELL SPRING WATER
COMPANY,

Appellants.

316 I.A. 158

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

179
254

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

For many years defendant, Dynell Spring Water Company, a Corporation, was engaged in the business of selling water from a well located at 95th street in Palos Township, Cook county, Illinois, and March 31, 1938, entered into a written contract with plaintiff whereby plaintiff was to buy 14,495,000 gallons of ^{the} water, covering a period of about 15 years, at certain specified prices. January 3, 1939, plaintiff, contending defendants had breached the contract, brought suit in the Municipal court to recover \$810.45. Defendants denied breaching the contract and took the position it was breached by plaintiff. Afterward, April 14, 1939, while this suit was pending, plaintiff brought another suit in the Municipal court against defendants claiming other damages of \$222.30 on account of the claimed breach of the same contract. Defendants filed their defense denying liability, and January 22, 1940, plaintiff filed an amended and supplemental statement of claim in that suit seeking to recover \$1,546.01. Defendants again denied liability. The cases were consolidated and tried before the court without a jury, and July 9, 1941, the court found in favor of plaintiff in both suits, and in the first assessed plaintiff's damages at \$541.34 and in the second, \$1,471.20. Judgments were entered on the finding and defendants appeal.

3161A.158

42100

THE THOMSON CORPORATION,
Corporation,

Appellee,

vs.

DYNELL SPRING WATER COMPANY,
Corporation, ON BEHALF OF
and CARLIE G. COY, a leg-
itimate as DYNELL SPRING WATER
COMPANY,
Appellants.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

For many years defendant, DYNELL Spring Water Company, Corporation, was engaged in the business of selling water from a well located at 35th street in Lake Township, Cook county, Illinois, and March 31, 1938, entered into a written contract with plaintiff whereby plaintiff was to pay 14,425,000 gallons of water, covering a period of about 15 years, at certain specified prices. January 3, 1939, plaintiff, contending defendants had breached the contract, brought suit in the Municipal Court to recover \$10,465. Defendants denied breaching the contract and took the position it was breached by plaintiff. Afterward, April 14, 1939, while this suit was pending, plaintiff brought another suit in the Municipal Court against defendants claiming other damages of \$22,500 on account of the claimed breach of the same contract. Defendants filed their defense denying liability, and January 25, 1940, plaintiff filed an amended and supplemental statement of claim in that suit seeking to recover \$1,548.01. Defendants again denied liability. The cases were consolidated and tried before the court without jury, and July 9, 1941, the court found in favor of plaintiff in both suits, and in the first assessed plaintiff's damages at \$41.34 and in the second, \$1,471.30. Judgments were entered on the finding and defendants appeal.

The record discloses that defendant, Dynell Spring Water Company, a corporation, had been engaged in the mineral water business in Palos Township for about 18 years. Ivan P. Florsheim, president of plaintiff company, testified he was a drug specialist. March 31, 1938, plaintiff and Dynell Spring Water Company, entered into a written contract which recited that the Dynell Company had exclusive control of water from the well located at 95th Street, in Palos Township; that the Florsheim Company was desirous of securing the sole agency for the distribution and sale of the water in the United States, exclusive of Chicago and certain of its suburbs. The water was to be bottled and crated by the Dynell Company in one and five gallon bottles for certain specific prices. The contract provided that plaintiff would take 60,000 gallons of water by April 1, 1939; from April 1, 1939 to September 30, 1939, 100,000 gallons, and thereafter, approximately every 6 months, the quantity was greatly increased until it was provided that from October 1, 1952 to March 31, 1953, plaintiff would take 813,000 gallons and as stated above the total number of gallons was 14,495,000. The contract contained many other provisions not necessary to mention here.

At the time of the execution of the contract defendants, Charles A. Coey and Carrie G. Coey, executed another document addressed to plaintiff. The Florsheim Company, in which they represented they were the sole owners of the land upon which the well was located; that the Dynell Company had the exclusive right to the disposal and marketing of the water taken from the well and that while the contract was in force they would do nothing to prevent The Florsheim Company from taking the water as specified in its contract with the Dynell Company. And further,

The record discloses that defendant, Lynell Spring Water Company, a corporation, had been engaged in the general water business in Palos Township for about 18 years. Ives H. Florenheim, president of plaintiff company, testified he was a drug specialist. March 31, 1932, plaintiff and Lynell Spring Water Company entered into a written contract which recited that the Lynell Company had exclusive control of water from the well located at 45th Street, in Palos Township; that the Florenheim Company was desirous of securing the sole agency for the distribution and sale of the water in the United States, exclusive of Chicago and certain of its suburbs. The water was to be bottled and crated by the Florenheim Company in one and five gallon bottles for certain specific prices. The contract provided that plaintiff would take 30,000 gallons of water by April 1, 1932; from April 1, 1932, to September 30, 1932, 100,000 gallons, and thereafter, approximately every 6 months, the quantity was greatly increased until it was provided that from October 1, 1932 to March 31, 1933, plaintiff would take 210,000 gallons and as stated above the total number of gallons was 14,425,000. The contract contained many other provisions not necessary to mention here.

At the time of the execution of the contract defendant, Charles A. Coey and Carrie D. Coey, executed another document addressed to plaintiff, The Florenheim Company, in which they represented they were the sole owners of the land upon which the well was located; that the Lynell Company had the exclusive right to the disposal and marketing of the water taken from the well and that while the contract was in force they would do nothing to prevent the Florenheim Company from taking the water as specified in its contract with the Lynell Company, and further,

" This statement is made for the purpose of inducing the Florsheim Corporation this day to execute and enter into an agreement with the Dymell Spring Water Company. "

In September, 1938, plaintiff, The Florsheim Company, sold to Albert D. Huesing, who was in business in Rock Island, Illinois, about 200 cases of the water which had been bottled by the Dynell Company for The Florsheim Company in accordance with the terms of the contract. Huesing testified by deposition that he used some of the water but claimed there was dirt and foreign substance in it so that it could not be used, that he had complaints from some of the persons to whom he had sold water but could not remember their names; and that in November of 1938, he returned 190 cases of the water to plaintiff.

Plaintiff's position is that the Dynell Company, in bottling the water, did not do so properly and as a result there was dirt in it; that the bottles were not made clean, and therefore the water was not saleable; that when it took this matter up with the Dynell Company and the Dynell Company denied there was any dirt in the water or that it had not been properly bottled that in a telephone conversation between representatives of the parties defendant refused to carry out the contract. On the other side, the Dynell Company's position is that the bottles were thoroughly cleaned before filling; that there was no dirt in the water, and denied its representative had stated over the telephone that it was agreeable to the Dynell Company that the Contract be terminated. Their counsel contend that " a careful examination of the circumstances surrounding the filing of these suits indicates an effort to create a smoke screen of evidence to cover plaintiff's attempt to get from under the terms of said contract. "

" This statement is made for the purpose of inducing the Plaintiff Corporation this day to execute and enter into an agreement with the Plaintiff Spring Water Company."

In September, 1930, Plaintiff, the Plaintiff Company, sold to Albert D. Huesing, who was in business in Rock Island, Illinois, about 200 cases of the water which had been bottled by the Plaintiff Company for the Plaintiff Company in accordance with the terms of the contract. Huesing testified by deposition that he used some of the water but claimed there was dirt and foreign substance in it so that it could not be used, that he had complaints from some of the persons to whom he had sold water but could not remember their names; and that in November of 1930, he returned 10 cases of the water to Plaintiff.

Plaintiff's position is that the Plaintiff Company, in bottling the water, did not do so properly and as a result there was dirt in it; that the bottles were not made clean, and therefore the water was not saleable; that when it took this matter up with the Plaintiff Company and the Plaintiff Company denied there was any dirt in the water or that it had not been properly bottled that in a telephone conversation between representatives of the parties defendant refused to carry out the contract on the other side, the Plaintiff Company's position is that the bottles were thoroughly cleaned before filling; that there was no dirt in the water, and denied the representative had stated over the telephone that it was impossible for the Plaintiff Company to get the water to be terminated. Their counsel contended that "a contract is terminated of the circumstances surrounding the filling of these bottles indicates an effort to create a smoke screen of evidence to cover Plaintiff's attempt to get from under the terms of the contract."

Plaintiff's statement of claim filed in the first suit alleges that September 22, 1938, defendants sold and delivered to plaintiff 200 cases of ^{the} water at 72 cents a case, or \$144 and that plaintiff sold it to Huesing for \$2.80 per case, or a total of \$560. At what price Huesing sold it to his customers does not appear. The testimony of Charles E. Coey and his wife describes the manner in which the water was bottled, which tends to show that the bottles were thoroughly cleansed before they were filled and that no foreign substance was in the water. Evidence offered by plaintiff, including the testimony of Huesing, was that there was dirt in the water and some of the bottles were not properly cleansed. Two of the bottles which were sent by plaintiff to Huesing in Rock Island, were introduced in evidence as a part of Huesing's deposition and they are before us. We have examined these bottles, one of which the evidence shows, had not been opened since it was filled by the Dynell Company, so that we are in as good a position to determine the question as to the condition of these two bottles and the water in them, as was the trial judge. We are unable to say what his finding on this point was but we are clear that there is no dirt in the water nor are the bottles in such a condition that it could be said they were so unclean as to prevent their sale.

Considerable is said in the briefs and argument as to whether there was an implied warranty that the water would be fit for the purpose for which it was sold but we think that question is not involved for the reason that the only complaint made by plaintiff is that the water and bottles were dirty. This being the fact, we think the analysis made by a witness for defendant, which was excluded, was not admissible except that part where the doctor,

Plaintiff's statement of claim filed in the first suit alleges that September 22, 1938, defendants sold and delivered to plaintiff 200 cases of ^{the} water at 75 cents a case, or 15¢ and that plaintiff sold it to Huesing for \$2.00 per case, or a total of \$400. At that price Huesing sold it to his customers does not appear. The testimony of Charles L. Cooley and his wife described the manner in which the water was bottled, which tends to show that the bottles were thoroughly cleaned before they were filled and that no foreign substance was in the water, evidence offered by plaintiff, including the testimony of Huesing, was that there was dirt in the water and some of the bottles were not properly cleaned. Two of the bottles which were sent by plaintiff to Huesing in Rock Island, were introduced in evidence as a part of Huesing's deposition and they are before me. We have examined these bottles, one of which the evidence shows, had not been opened since it was filled by the Dymall Company, so that we are in a good position to determine the question as to the condition of these two bottles and the water in them, as was the trial judge. We are unable to say that his finding on this point was but we are clear that there is no dirt in the water nor are the bottles in such a condition that it could be said they were so unclean as to prevent their sale.

Considerable is said in the briefs and argument as to whether there was an implied warranty that the water would be fit for the purpose for which it was sold but we think that question is not involved for the reason that the only complaint made by plaintiff is that the water and bottles were dirty. This being the fact, we think the analysis made by a witness for defendant, which was excluded, was not admissible except that that was the factor,

who made the analysis, testified that he examined the water from ten bottles and found it clean. That part of his testimony should have been admitted. The analysis which he made was wholly unimportant and properly excluded.

of
We are further of opinion that the court was in error in excluding some of the testimony of defendant Charles A. Coey and his wife. Charles A. Coey testified that for 18 years he had been engaged in the mineral water business in Palos Park; that he and his wife had owned the property for 30 years; that he was engaged president of the Dynell Company, in bottling and selling the water which comes from 300 feet below the earth's surface, the last 80 feet of the water coming through solid rock; that he had personal charge of the bottling and shipping of the water to Huesing. He described in detail the method followed; that he inspected every one of the bottles. This last part of his testimony was erroneously stricken. The witness further testified that after the bottles were returned by Huesing he examined each bottle and found "every one of them clear, pure and clean." That after the bottles were returned by Huesing he talked with Mr. Florsheim over the telephone and told him the water had been received from Rock Island, that he examined the bottles and "they were just as clean as when they left our bottling plant." That Mr. Florsheim said he had a bottle that had some sand and gravel in it and I asked him to let me see it; that Mr. Florsheim said he would, but never did, although he made several requests.

Mrs. Coey testified, among other things, that on July 28, 1938 [which was about 3 1/2 months after the contract was made] Mr. Florsheim called at the bottling plant and handed two documents to her requesting that she and her husband sign them.

no such the analysis, testified that he examined the water from the bottles and found it clear. That part of his testimony cannot be v been admitted. The analysis which he made was wholly unimportant

and properly excluded.

We are further advised that the court was in error in excluding some of the testimony of Robert Charles A. Gray and his wife, Charles A. Gray, testified that for 12 years he and his wife engaged in the mineral water business in Lake Park, Ga. and his wife had owned the property for 30 years; that he was

engaged

president of the Cyclist Company, in Lake Park, Ga. and testified that which comes from 500 feet below the earth's surface, the last 50 feet of the water coming through solid rock; that he had personal charge of the bottling and shipping of the water to customers. described in detail the method followed; that he instructed every one of the bottles. This last part of his testimony was erroneously admitted. The witness further testified that after the bottles

were returned by leaving he examined each bottle and found "every one of them clear, pure and clean." That after the bottles were returned by leaving he talked with Mr. Thompson over the telephone and told him the water had been received from Lake Park, Ga. that he examined the bottles and "they were just as clear as when they left our bottling plant." That Mr. Thompson told he had bottle that had some sand and gravel in it and he asked him to let

me see it; that Mr. Thompson said he would, but never did, although he made several requests.

Mr. Gray testified, among other things, that on July 10, 1938 [which was about 3 1/2 months after the accident was made] Mr. Thompson called at the bottling plant and handed the documents to him requesting that he and his husband sign them.

The documents were then offered in evidence but on objection by counsel for plaintiff, on the ground that they tended to vary the terms of the written contract of March 31, 1938, they were excluded. This was error. While we have not the documents before us, counsel for defendants having failed to copy them into the record, we have his statement that the two documents modified the contract of March, 1938. This offered evidence would tend to sustain defendants' contention that plaintiff was endeavoring to modify, and later get from under the contract.

There is argument as to whether what purports to be a printed analysis of the water from the well, made by the Chicago Laboratory, was a part of the contract of March 31, 1938, and whether it was offered and received in evidence. These questions may be cleared up on a retrial of the case.

Counsel for defendants further contend that the court erred in denying their motion to file a counter claim setting up their claimed damages for failure of plaintiff to carry out the terms of the contract.

The Statement of claim in one case was filed January 3, 1939, and in the other, April 14, 1939, to which defendants filed their affidavit of merits and defendants did not move to file a counter claim until October 15, 1940, when the case was set for trial. We think the matter was within the discretion of the court. Since we have reached the conclusion that there must be a retrial of the case as against the Dynell Spring Water Company, a corporation, the court might well permit such defendant, if it so desires, to file a counter claim because when the case is redocketed, this can be done before the time of the trial is fixed.

A further contention is made that the court erred in entering judgment against Charles A. Coey and Carrie G. Coey because the contract involved, for the purchase and sale of the 15 million

The documents were then offered in evidence but on objection by counsel for plaintiff, on the ground that they tended to vary the terms of the written contract of March 31, 1938, they were excluded. This was error. While we have not the documents before us, counsel for defendants having failed to copy them into the record, we have this statement that the two documents modified the contract of March, 1938. This offered evidence would tend to sustain defendants' contention that plaintiff was endeavoring to modify, and later get from under the contract.

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Counsel for defendants further contend that the court erred in denying their motion to file a counter claim setting up their claimed damages for failure of plaintiff to carry out the terms of the contract.

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A further contention is made that the court erred in entering judgment against Charles A. Goetz and Gertrude G. Goetz because the contract involved, for the purchase and sale of the 12 million

gallons of water, was made between the plaintiff, Florsheim corporation and the Dynell Spring Water Company, a corporation, to which neither Charles A. Coey nor his wife was a party, In reply to this contention counsel for plaintiff say that the judgment against the individuals was properly entered because at the time of the making of the contract, March 31, 1938, the two individuals executed, simultaneously with the execution and delivery of the contract, another document "wherein they represented that they were the sole owners of the land on which the Dynell Spring is located and that the Dynell Spring Water Company had the exclusive right to dispose and market ^{the water} from the spring."

We have above referred to this document but we think it insufficient to warrant judgment entered against the two individuals. The document simply recited that the land in which the well was located belonged to the individuals; that they would not hinder the Dynell Company in carrying out the written contract for the sale of 15 million gallons of water. There is no contention that they made any objection to the Dynell Company carrying out the contract. The judgment against the individuals must be reversed. We are also of opinion that the finding and judgment in plaintiff's favor against the defendant, Dynell Spring Water Company, a corporation, is against the manifest weight of the evidence and for that reason and the further reason that the court improperly excluded some evidence offered by defendants, the judgment as to the Dynell Company is reversed and the cause remanded.

The judgment of the Municipal court of Chicago against Charles A. Coey and Carrie C. Coey is reversed. The judgment against the Dynell Spring Water Company, a corporation, is reversed and the cause remanded as to that defendant.

REVERSED AS TO CERTAIN DEFENDANTS, REVERSED AND
REMANDED AS TO OTHER DEFENDANTS.

Matchett, P.J., and McSurely, J., concur.

gallons of water, was made between the plaintiff, Jovanheim corporation and the Dynell Spring Water Company, a corporation, to which neither Charles A. Goey nor his wife was a party, in reply to this contention counsel for plaintiff say that the judgment against the individuals was properly entered because at the time of the making of the contract, March 31, 1938, the two individuals executed, almost simultaneously with the execution and delivery of the contract, another document wherein they represented that they were the sole owners of the land on which the Dynell Spring is located and that the Dynell Spring Water Company had the exclusive right to dispose and market from the spring. "the water"

We have above referred to this document but we think it insufficient to warrant judgment entered against the two individuals. The document simply recited that the land in which the well was located belonged to the individuals; that they could not hinder the Dynell Company in carrying out the written contract for the sale of 15 million gallons of water. There is no contention that they made any objection to the Dynell Company carrying out the contract. The judgment against the individuals must be reversed. We are also of opinion that the finding and judgment in plaintiff's favor against the defendant, Dynell Spring Water Company, a corporation, is against the manifest weight of the evidence and for that reason and the further reason that the court improperly excluded some evidence offered by defendants, the judgment as to the Dynell Company is reversed and the cause remanded.

The judgment of the Municipal Court of Chicago against Charles A. Goey and Charlie C. Goey is reversed. The judgment against the Dynell Spring Water Company, a corporation, is reversed and the cause remanded as to that defendant.

REVEREND AS TO C. T. IN DEFENDANT, REVEREND AND REMANDED AS TO OTHER DEFENDANTS.

Matchett, P.J., and Kennedy, J., concur.

42110

316 I.A. 159'

SUSAN E. HEISE,

Appellant,

v.

MARY A. WRIGHT, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 16, 1939, plaintiff filed her complaint in equity to set aside the will and codicil of her brother, Edward J. Glakin. It was executed January 16, 1939, and the codicil February 10, 1939. The testator died June 15, 1939, and the will and codicil were admitted to probate by the Probate Court of Cook County September 7, 1939. Forty-eight parties were named as defendants. Upon the filing of the bill summons issued, and upon plaintiff's direction to the sheriff but eight of the defendants were served, the dates of such service being October 16, 19, 20, 30 and November 6, 1939. December 1, 1939, the eight defendants, part of them represented by one attorney and the others by another, filed two separate motions to dismiss the complaint on the ground of claimed insufficiencies in the allegations of the complaint. So far as the record discloses, nothing has been done to dispose of either of these motions. February 28, 1941, which is more than a year and four months after the suit was commenced, a special appearance, by leave of court, and its verified motion to dismiss the complaint, were filed by the Holy Family Church, located at 1018 West Roosevelt Road, Chicago, one of the legatees under the will and a defendant to the suit. It was further ordered that the hearing on the motion and such answers as might be filed to it, be set for April 9, 1941, at

31014.158

42110

APPEAL FROM
CIRCUIT COURT,
DEER COUNTY.

SUSAN M. HEISE,
Appellant,
v.
MARY A. WRIGHT, et al.,
Appellees.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 18, 1939, plaintiff filed her complaint in equity to set aside the will and codicil of her brother, Edward J. Glavin. It was executed January 18, 1939, and the codicil February 10, 1939. The testator died June 18, 1939, and the will and codicil were admitted to probate by the probate court of Deer County September 7, 1939. Forty-eight parties were named as defendants. Upon the filing of the bill answers were filed, and upon plaintiff's direction to the sheriff out of the defendants were served, the dates of such service being October 18, 19, 20, 30 and November 6, 1939. December 1, 1939, the eight defendants, part of them represented by one attorney and the others by another, filed two separate motions to dismiss the complaint on the ground of claimed immateriality in the allegations of the complaint. To the effect that the record discloses, nothing has been done to dispose of either of these motions. February 28, 1941, which is more than a year and four months after the suit was commenced, a special appearance, by leave of court, and its verified motion to dismiss the complaint, were filed by the Holy Family Church, located at 1018 West Roosevelt Road, Chicago, one of the legatees under the will and a defendant to the suit. It was further ordered that the hearing in the motion and such answers as might be filed to it, be set for April 1, 1941, at

11 A.M. without further notice.

It was alleged, among other things, in the motion which is in the nature of a petition, that plaintiff, Susan E. Heise, was a sister of the deceased and that Elizabeth Ritter, who was one of the heirs and a necessary party, had not been made a party to the suit. It then set up that but 8 of the 48 defendants were served in accordance with plaintiff's directions and no attempt had been made to serve the other defendants although the addresses of most of them were in Chicago and well known to plaintiff. A number of other orders were entered continuing the motion to dismiss the suit, and October 14, 1941, an order was entered sustaining the motion and dismissing the suit at plaintiff's costs. Plaintiff appeals.

There is no dispute as to the facts as above stated. Counsel for plaintiff in their brief say, "It is our contention, and has been the practice in these Courts for many years, that in the cause when reached for trial the plaintiff *** could dismiss all defendants who were not served with summons, and proceed with the other served defendants.

"This entire procedure was a matter which was not properly before the Circuit Court of Cook County on October 14, 1941, and this plaintiff, Susan E. Heise, should have been given an opportunity of impleading such new defendant or defendants and serving the same, or, in the alternative, that the Court might have dismissed the proceedings against such unserved defendants and permit this plaintiff to proceed to a hearing with such defendants which she deemed necessary and proper, and who, as the records disclose, were served and properly before the Court.

" The question of unreasonable delay originally against

11 A.M. without further notice.

It was alleged, among other things, in the motion which is in the nature of a petition, that Plaintiff, Susan E. Heise, was a sister of the deceased and that Elizabeth Bitter, who was one of the heirs and a necessary party, had not been made a party to the suit. It then set up that but 8 of the 48 defendants were served in accordance with Plaintiff's directions and no attempt had been made to serve the other defendants although the addresses of most of them were in Chicago and well known to Plaintiff. A number of other orders were entered continuing the motion to dismiss the suit, and October 14, 1941, an order was entered sustaining the motion and dismissing the suit at Plaintiff's cost. Plaintiff's motion and the facts as to the facts as above stated.

There is no dispute as to the facts as above stated. Counsel for Plaintiff in their brief say, "It is our contention, and has been the practice in these Courts for many years, that in the cases when reached for trial the Plaintiff should dismiss all defendants who were not served with summons, and proceed with the other served defendants."

"This entire procedure was a matter which has not properly before the Circuit Court of Cook County on October 14, 1941, and this Plaintiff, Susan E. Heise, should have been given an opportunity of impeaching such new defendant or defendants and serving the same, or, in the alternative, that the Court might have dismissed the proceedings against such unserved defendants and permit this Plaintiff to proceed to a hearing with such defendants which she deemed necessary and proper, and who, as the records disclose, were served and properly before the Court."

"The question of unreasonable delay originally against

the plaintiff in bringing the case to issue is one chargeable not alone to this plaintiff but likewise to the appearing defendants." One difficulty with this contention is that so far as the record discloses, plaintiff never asked for an opportunity to dismiss any defendants nor to serve those that had not been served and she does not ask this in the briefs filed in this court. Evidently she is content to have the suit stand without being disposed of.

The question for decision is, did the court err in dismissing the suit for want of diligence by plaintiff in prosecuting her suit. We think this must be answered in the negative. Par. 2, Rule 5, Supreme Court of Illinois; Sanitary Dist. of Chicago v. Chapin, 226 Ill. 499; Daly v. City of Chicago, 295 Ill. 276; Svela v. Bloch, 294 Ill. App. 515; Snyder v. Whitney 310 Ill. App. 297.

Par. 2, of Rule 5, of Our Supreme Court provides; "Where the plaintiff fails to show reasonable diligence to obtain service through the issuance of alias writs, the action may be dismissed on the application of any defendant or on the court's own motion." In Sanitary Dist. of Chicago v. Chapin 226 Ill. 499; it was held that a court has power, independently of any statute, to dismiss a suit for failure to prosecute it with due diligence, where no excuse for its delay is presented. In the instant case there is no excuse of any kind offered why the suit was not prosecuted. The record discloses that although 8 defendants were served as plaintiff requested, and they filed their motions to dismiss, no attempt was made to serve the other 40 defendants. More than a year and four months thereafter, the Holy Family Church, one of the legatees named in the will, filed its motion to dismiss and although this motion was pending

the plaintiff in bringing the case to this is not changed by not alone to this plaintiff but likewise to the "defendants." One difficulty with this contention is that as far as the record discloses, plaintiff never asked for an opportunity to disallow any defendants nor to serve those that had not been served and she does not ask this in the briefs filed in this court. Evidently she is content to have the suit stand without being disposed of.

The question for decision is, did the court err in dismissing the suit for want of diligence by plaintiff in prosecuting her suit. We think this must be answered in the negative. Par. 6, Rule 6, Supreme Court of Illinois; Sanitary Dist. of Chicago v. Goshin, 228 Ill. 499; Daly v. City of Chicago, 228 Ill. 276; Levin v. Bloch, 224 Ill. 404, 514; Sanjour v. Milroy, 310 Ill. 494, 507.

Par. 6, of Rule 6, of our Supreme Court provides; "where the plaintiff fails to show reasonable diligence to obtain service through the issuance of alias writs, the action shall be dismissed on the application of any defendant or on the court's own motion." In Sanitary Dist. of Chicago v. Goshin, 228 Ill. 499; it was held that a court has power, independently of any statute, to dismiss a suit for failure to prosecute it with due diligence, where no excuse for its delay is presented. In the instant case there is no excuse of any kind offered why the suit was not prosecuted. The record discloses that plaintiff's defendants were served as plaintiff requested, and they filed their motions to dismiss; no attempt was made to serve the other 40 defendants. More than a year and four months thereafter, the Holy Family Church, one of the legatees named in the will, filed its motion to dismiss and although this motion was pending

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for about 7 months, no attempt was made by plaintiff to serve anybody, nor to make any additional defendant, nor to make any move, and in this court nothing is pointed out that she expected to do in the future in case the dismissal was set aside.

The order of the Circuit court of Cook county dismissing the suit is affirmed.

ORDER AFFIRMED.

Matchett ,P.J., and McSurely,J., concur.

for about 7 months, no attempt was made by plaintiff to move anybody, nor to make any additional detention, nor to make any move, and in this court nothing is ordered at that time expected to do in the future in case the dismissal was set aside.

The order of the Circuit court of Cook county dissolving the suit is affirmed.

ORAL AFFIDAVIT

Matchett, P.J., and McGraw, J., concur.

42146

MILLER FUR COMPANY, a Corporation,
Appellant,

v.

IRENE GOMBOSSY,

Appellee.

313 I.A. 159²

APPEAL FROM

MUNICIPAL COURT,
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 30, 1939, plaintiff caused judgment to be entered by confession against defendant for \$334.11, being the balance claimed to be due on defendant's promissory note, \$277.25 principal, \$6.86 interest and \$50 attorney's fees. An execution was issued on the judgment and April 11, 1939, demand for payment made, April 20, defendant filed her verified petition to vacate the judgment and for leave to defend, and on the same date, by agreement of parties, an order was entered giving defendant leave to appear and defend, the judgment to stand as security. The case was not tried until September 24, 1941, when there was a hearing before the court without a jury, and a finding and judgment against plaintiff, judgment entered on the finding, and plaintiff appeals.

The record discloses that October 31, 1938, plaintiff sold defendant a Japanese mink fur coat for \$489.25, plus insurance of \$18. On that date defendant paid \$100 on account and executed her note, with monthly payments to be made of \$40.73, with interest at 6% per annum. The coat was not delivered to defendant until about December 1, 1938. The first monthly payment was to be made December 6, 1938, and every month thereafter. December 6, defendant paid \$45, January 6, 1939, \$45, and February 6, 1939, \$40, but made no payments thereafter.

MISCELLANEOUS COMPANY, a Corporation,
Appellant,

MUNICIPAL COURT,
OF CHICAGO,

Appellee.

IRVING GOLDBERG,

Appellee.

JUSTICE OF THE COURT DELIVERED THE FOLLOWING OPINION:

March 30, 1938, plaintiff caused judgment to be entered by confession against defendant for \$354.11, being the balance claimed to be due on defendant's promissory note, \$500.00 principal, 6.88 interest and \$50 attorney's fees. An execution was issued on the judgment and April 11, 1938, demand for payment made. April 20, defendant filed her verified petition to vacate the judgment and for leave to defend, and on the same date, by agreement of parties, an order was entered giving defendant leave to appear and defend, the judgment to stand as security. The case was not tried until September 24, 1941, when there was a hearing before the court without a jury, and a finding and judgment against plaintiff, judgment entered on the finding, and plaintiff appeals.

The record discloses that October 31, 1938, plaintiff sold defendant a Japanese mine for cost for \$489.45, plus insurance of \$18. On that date defendant paid \$100 on account and executed her note, with monthly payments to be made of \$40.73, with interest at 6% per annum. The cost was not delivered to defendant until about December 1, 1938. The first monthly payment was to be made December 6, 1938, and every month thereafter. December 6, defendant paid \$45, January 6, 1939, \$45, and February 6, 1939, \$40, but made no payments thereafter.

Defendant's position was that the coat was not durable and well made as represented; that after she had worn the coat for about 3 weeks it ripped in various places and was returned to plaintiff for repairs which were made. Immediately after it was returned to defendant it started to rip again, was again returned to plaintiff and the rips repaired. About 10 days thereafter, it again began to rip in divers places and the coat was then again taken back to plaintiff and again repaired. Shortly afterward defendant again returned the coat to plaintiff stating the coat was not as represented, that it was not durable and that in addition to this ripping it did not fit her; that she then offered to return the coat, demanded a new one, which was refused, and that afterward she was unable to wear the coat because of rips, tears and general unfitness that March 9, 1939, she offered to return the coat. On cross-examination defendant corrected this by stating it was March 1940, She testified that " I am willing to return the coat and you give me a release, a release for my coat, and a release of the judgment," and that she was willing to sacrifice the \$230 she had paid - - let defendant keep that and take back its coat. That this offer was refused.

Witnesses for plaintiff testified admitting that the coat had been returned by defendant a number of times for repairs, which were made substantially as testified by defendant.

Willard Hellinger, called by plaintiff, testified he had worked for the plaintiff fur company for 18 years, that he saw the coat when it was brought to the store in 1939. " I did the repair work and sewing on it. I do not remember whether it was torn in the same place where it is torn now, but I do remember it was in the sleeve in the places where it gets the most wear.

Defendant's position was that the coat was not durable and well made as represented; that after she had worn the coat for about 3 weeks it ripped in various places and she returned to plaintiff for repairs which were made. Immediately after it was returned to defendant it started to rip again, was again returned to plaintiff and the rips repaired. About 10 days thereafter, it again began to rip in several places and the coat was then again taken back to plaintiff and again repaired. Shortly after defendant again returned the coat to plaintiff stating the coat was not as represented, that it was not durable and that in addition to this ripping it did not fit her; that she then offered to return the coat, demanded a new one, which was refused, and that afterward she was unable to wear the coat because of rips, tears and general unfitness. March 9, 1939, she offered to return the coat. On cross-examination defendant connected this by stating it was March 1940. She testified that "I am willing to return the coat and you give me a release, a release for my coat, and a release of the judgment," and that she was willing to sacrifice the \$200 she had paid - let defendant keep that and take back the coat. That this offer was refused. Witnesses for plaintiff testified admitting that the coat had been returned by defendant a number of times for repairs, which were made substantially as testified by defendant. Willard Hallinger, called by plaintiff, testified he had worked for the plaintiff fur company for 18 years, that he saw the coat when it was brought to the store in 1939. "I did the repair work and sewing on it. I do not remember whether it was torn in the same place where it is torn now, but I do remember it was in the sleeve in that place where it is torn now."

The pelt isn't torn, it is in the seam. *** It is made of hundreds and hundreds of pieces and that is how you get the effect of a drop-skin only 21 inches long." That he was the only employe of plaintiff who worked on that kind of fur. " There is a tendency for the skins to become dry under the arm pits."

When the evidence was all in, counsel for defendant said:
" If the Court please, we are willing to return the coat now. We have no use of it from ~~March~~ of 1939. It is only a storage service charge. Since that time she purchased a new fur coat. Of course, now it is in storage because of the weather." The court then found for defendant and this appeal followed.

The coat was introduced in evidence and is before us on this appeal. There are many rips, some large and some small and it is in a bad state of repair. Defendant has filed no brief in this court. Counsel for plaintiff in his brief says : "The defendant, except for returning the coat ^{for} ~~at~~ intervals of a few hours for repairing rips in seams, kept the coat in her possession and still retains the coat in her possession, and has, at no time, attempted to rescind the sale by returning the coat and demanding recovery of the money paid. Even at the trial of this case no tender of the coat was made, nor was there any set-off or counter-claim filed to recover the amount paid. The only attempt made by the defendant to return the coat was about two years after the sale, after judgment had been confessed on her note and when this case was about to be reached for trial. She then offered to return the coat for a release of the judgment and forfeit her claim to the \$230 paid on account. At no time was there any attempt to rescind the contract of purchase. The only defense made is that the coat did not fit properly and ripped a few times, although each time it was promptly repaired by the plaintiff."

The belt isn't torn, it is in the same. "It is made of hundreds and hundreds of pieces and that is how you get the effect of a drop-skin only 21 inches long." That he was the only employee of plaintiff who worked on that kind of fur. "There is a tendency for the skins to become dry under the arm pits."

When the evidence was all in, counsel for defendant said: "If the Court please, we are willing to return the coat now. We have no use of it from March of 1939. It is only a storage service charge. Since that time she purchased a new fur coat. Of course, now it is in storage because of the weather." The court then found for defendant and this appeal followed.

The coat was introduced in evidence and is before us on this appeal. There are many rips, some large and some small and it is in a bad state of repair. Defendant had filed no brief in this court. Counsel for plaintiff in his brief says: "The defendant, except for returning the coat, has been in possession and still retains the coat in her possession, and has, at no time, attempted to rescind the sale by returning the coat and demanding recovery of the money paid. Even at the trial of this case no tender of the coat was made, nor was there any set-off or counter-claim filed to recover the amount paid. The only attempt made by the defendant to return the coat was about two years after the sale, after judgment had been entered on her note and when this case was about to be reached for trial. She then offered to return the coat for a refund of the judgment and forfeit her claim to the \$230 paid on account. At no time was there any attempt to rescind the contract of purchase. The only defense made is that the coat did not fit properly and it was a few times, although each time it was properly returned by the plaintiff."

As above stated, defendant testified that she offered to return the coat and permit plaintiff to retain \$230 upon release of the judgment against her. There is no dispute that the coat was not durable and although it was a new coat, it was necessary to repair it frequently on account of ripping and it was also torn in places. In these circumstances we think, upon a consideration of the entire record, that we cannot say the judgment of the court was not warranted.

The coat will be returned by the clerk of this court to plaintiff upon calling for it, and the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

As above stated, defendant testified that she differed

to return the coat and permit plaintiff to retain it in 1930 upon

release of the judgment against her. There is no dispute that the

coat was not durable and although it was a new coat, it was necessary

to repair it frequently on account of riding and it was also

torn in places. In these circumstances we think, upon a consideration

tion of the entire record, that we cannot say the judgment

of the court was not warranted.

The coat will be returned by the clerk of this court to

plaintiff upon calling for it, and the judgment of the undersigned

court of Chicago is affirmed.

JUDGMENT AFFIRMED.

WATCHELT, P. J., and HOLBURY, J., concur.

42165

RUTH RICH SHENNAN and
JOSEPH E. RICH,
Appellants

v.

CHRISPENS TRUCK LINES, INC., a
Corporation, DAVE CHRISPENS,
Individually and doing business
as DAVE CHRISPENS TRUCK LINES,
and FRED BERGARDT,
Appellees.

316 I.A. 100¹

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff Ruth Rich Shennan, brought an action to recover damages for personal injuries and plaintiff Joseph E. Rich, her brother, sought to recover damages for the wreckage of his automobile which resulted from a collision of the automobile with a tractor owned and operated by defendant, Chrispens Truck Lines. There was a jury trial, a verdict and judgment in defendants' favor and plaintiffs appeal.

Dustin Grannis brought an action against Chrispens Truck Lines to recover for personal injuries sustained by him as a result of the same collision, he having been in the automobile which was being driven at the time by plaintiff, Ruth Shennan. The two cases were tried together and during the trial Grannis took a voluntary nonsuit.

The record discloses that about 7 o'clock on the evening of November 20, 1938, plaintiff Ruth Rich Shennan (at the time of the accident, Ruth Rich) was returning from Wabash, Indiana, driving a Buick automobile belonging to plaintiff, her brother, Joseph E. Rich. Grannis was with her in the car. While rounding a curve on United States Highway 30, there was a collision with defendants' tractor being driven in the opposite direction. The tractor, which was without a trailer at the time, and the automobile, were greatly damaged, if not destroyed. U.S. Highway 30 is a two-lane,

31814.130

RUTH RICH SHERMAN and
JOSEPH E. RICH,
Appellants

ALL IN THE
SHERMAN COUNTY
GOOD COUNTY.

CHRISTENS TRUCK LINE, INC.,
Corporation, DAVE CHRISTENS,
Individually and doing business
as DAVE CHRISTENS TRUCK LINE,
and TRAD BERGANDT,
Appellees.

PLAINTIFFS' ANSWER TO THE BILL OF THE COURT.

Plaintiff Ruth Rich Sherman, brought an action to recover damages for personal injuries and Plaintiff Joseph E. Rich, her brother, sought to recover damages for the wreckage of his automobile which resulted from a collision of the automobile with a tractor owned and operated by defendant, Christens Truck Line. There was a jury trial, a verdict and judgment in defendants' favor and plaintiffs appeal.

Dustin Gray is brought an action against Christens Truck Line to recover for personal injuries sustained by him as a result of the same collision, he having been in the automobile which was being driven at the time by Plaintiff, Ruth Rich Sherman. The two cases were tried together and during the trial Gray is a voluntary nonsuit.

The record discloses that about 7 o'clock on the evening of November 3, 1936, Plaintiff Ruth Rich Sherman (at the time of the accident, Ruth Rich) was returning from Warsaw, Indiana, driving a Buick automobile belonging to Plaintiff, her brother, Joseph E. Rich. Gray was with her in the car. While rounding a curve on United States Highway 30, there was a collision with defendant's tractor being driven in the opposite direction. The tractor, which was without a trailer at the time, and the automobile, were greatly damaged, if not destroyed. U.S. Highway 30 is a two-lane

concrete highway about 20 feet wide. As a result of the impact, the automobile was smashed and turned ^{around} ~~over~~ so that when it came to rest it was facing practically east on the north side of the pavement. The tractor turned over two or three times and stopped on the shoulder to the south of the pavement about 75 feet east of the automobile.

Plaintiffs' theory is that the driver of the tractor, in rounding the curve, negligently crossed the center line of the pavement into the lane in which plaintiff was driving in the opposite direction, as a result of which the collision occurred. On the other side, defendants' position is that the tractor did not cross the center line of the pavement but that as the tractor was passing on the curve, a number of automobiles were coming west, driving in the north or westbound lane, when suddenly the automobile driven by Ruth Rich, which was the third or fourth in the line, suddenly shot out into the eastbound lane and collided with the tractor. Ruth was severely and permanently injured. Grannis was slightly injured. The driver of the tractor and his helper were also injured and the four persons were taken to a hospital in LaPorte, Indiana, which was about 24 miles from the scene of the accident.

Counsel for plaintiffs say that "Plaintiff Shennan and Dustin Grannis, both suffering from retrograde amnesia, were unable to recall anything of the accident or the events that transpired immediately thereto," so that they were unable to throw any light on how it happened. Grannis, however, who at and before the trial was a soldier at Camp Livingston, Louisiana, where his deposition was taken April 11, 1941, testified that immediately after the accident he saw Ruth "crumpled up" in an unconscious condition and helped carry her into the lunch room, called the Curve Inn, located on the north side of the curve. The case went to trial

concrete high as about 20 feet wide. As a result of the impact, the automobile was smashed and turned ~~xxx~~ around so that it came to rest it was facing practically east in the north side of the pavement. The tractor turned over two or three times and stopped on the shoulder to the south of the pavement about 75 feet east of the automobile.

Plaintiff's theory is that the driver of the tractor, in rounding the curve, negligently crossed the center line of the pavement into the lane in which plaintiff was driving in the opposite direction, as a result of which the collision occurred. On the other side, defendant's position is that the tractor did not cross the center line of the pavement but that as the tractor was passing on the curve, a number of automobiles were coming west, driving in the north or westbound lane, when suddenly the automobile driven by Ruth Rich, which was the third or fourth in the line, suddenly shot out into the eastbound lane and collided with the tractor. Ruth was severely and permanently injured. Grania was slightly injured. The driver of the tractor and his helper were also injured and the four persons were taken to a hospital in Lafayette, Indiana, which was about 24 miles from the scene of the accident.

Counsel for plaintiff say that "Plaintiff Grania and Dustin Grania, both suffering from retrograde amnesia, were unable to recall anything of the accident or the events that preceded it immediately thereafter," so that they were unable to testify as to how it happened. Grania, however, who sat at and before the trial was a soldier at Camp Livingston, Louisiana, where his deposition was taken April 11, 1921, testified that immediately after the accident he saw Ruth "crumpled up" in an unconscious condition and helped carry her into the lunch room, called the nurse in, located on the north side of the curve. The case went to trial

May 20, 1941. He testified that he had no recollection as to how the accident happened. "The first thing that I can recollect after the accident was seeing how bad the car was damaged up and seeing Betty Rich [Ruth], who was driving it, all crumpled up. I was unconscious after the accident." He then described the condition of the automobile and continuing said: "Immediately after the accident I got Betty Rich out of the car. Somebody helped me carry her into the little stand, hot dog stand or some kind of a place that was next to the road. * * * I had cuts on my face and then I was jittery and banged up. There were cuts on my forehead and on the side of my face." That he made telephone calls at the Curve Inn, calling the Addingtons, whom they had been visiting; that afterward they were taken to the hospital at La Porte, Indiana.

Counsel for plaintiffs contend the evidence shows part of the tractor was over the center line of the pavement, as a result of which the collision occurred; that this fact appears from the evidence of gouge marks in the pavement which were from 1 to 4 feet south of the center line and were caused by the right front fender of the tractor as it was knocked over on the right side by the impact between the two vehicles. That the width of the tractor would put the left side wheels north of the center line, in the westbound lane. That there were similar marks and gouges extending from the point of the collision in a southeasterly direction to where the tractor finally landed on the shoulder south of the pavement about 75 feet east of the automobile when they both came to rest.

The driver of the tractor, Fred Borgardt, and his assistant, Frank Hund, who was riding with him at the time, testified that the tractor did not cross the center line at any time but, as

May 30, 1941. He testified that he had no recollection as to how the accident happened. "The first thing that I can recall after the accident was seeing how bad the car was damaged up and seeing Betty Rich [Rush], who was driving it, all crumpled up. I was unconscious after the accident." He then described the condition of the automobile and continuing said: "Immediately after the accident I got Betty Rich out of the car. Somebody helped me carry her into the little stand, but dog stand or some kind of a place that was next to the road. * * * I had cuts on my face and then I was jittery and banged up. There were cuts on my forehead and on the side of my face." That he made telephone calls at the Curve Inn, calling the administrators, who they had been waiting; that afterwards they were taken to the hospital at La Porte, Indiana.

Counsel for Plaintiff contended the evidence shows that the tractor was over the center line of the pavement, as a result of which the collision occurred; that this fact appears from the evidence of gouge marks in the pavement which were from 1 to 4 feet south of the center line and were caused by the right fender of the tractor as it was knocked over on the right side by the impact between the two vehicles. That the width of the tractor would put the left side wheels north of the center line, in the westbound lane. That there were skid marks and gouges extending from the point of the collision in a southeasterly direction to where the tractor finally landed on the shoulder south of the pavement about 75 feet east of the automobile when they both came to rest.

The driver of the tractor, Fred Howerdt, and his assistant, Frank Rand, who was riding with him at the time, testified that the tractor did not cross the center line at any time but,

above stated, the automobile driven by Ruth, suddenly turned out of the westbound line of cars, crossed the center line, and the collision occurred.

No witness was produced who saw the collision except the four persons, two in the tractor and two in the automobile, but almost immediately after the accident, police officers and other persons gathered, and assisted the injured persons who were all taken to the hospital. They gave testimony as to the condition of the two vehicles, their location, skid marks, gouges, etc.

Plaintiffs contend the court erred in excluding certain evidence offered by them, in admitting evidence on behalf of defendants and in instructing the jury.

C. J. Beman, a salesman who lived in Winnetka, Illinois, called by plaintiffs, testified that he was coming from Ohio to Chicago, driving his automobile; that he arrived at the scene of the accident within a few minutes after it occurred; that the night was dark and clear, the pavement dry; that the tractor was off the south side of the pavement and the automobile near the north side; that the passengers were still in both vehicles when he got there. He described the curve in the roadway and the location of the Curve Inn; identified plaintiffs' Exhibit 4, taken November 28, eight days after the accident, as a correct representation of the roadway and the marks or scratches he saw in the pavement at the place in question; that the tractor was about 75 feet further east than the Buick automobile; that it was upside down when he first saw it and a man was still in the cab, and Ruth Rich still in the Buick; that he helped carry her from the car to the Curve Inn and then went over to the tractor; that "there was a lot of spilled gasoline around there. The truck was smashed and the gasoline tanks had burst." That he

above stated, the automobile driven by Ruth, suddenly turned out of the westbound line of cars, crossed the center line, and the collision occurred.

No witness was produced who saw the collision except the four persons, two in the tractor and two in the automobile, but almost immediately after the accident, police officers and other persons gathered, and assisted the injured persons who were all taken to the hospital. They gave testimony as to the condition of the two vehicles, their location, skid marks, gouges, etc. Plaintiffs contend the court erred in excluding certain evidence offered by them, in admitting evidence on behalf of defendants and in instructing the jury.

G. J. Beman, a salesman who lived in Winnetka, Illinois, called by plaintiffs, testified that he was coming from Ohio to Chicago, driving his automobile; that he arrived at the scene of the accident within a few minutes after it occurred; that the night was dark and clear, the pavement dry; that the tractor was off the south side of the pavement and the automobile near the north side; that the passengers were still in both vehicles when he got there. He described the curve in the roadway and the location of the Curve Inn; identified plaintiffs' Exhibit 4, taken November 28, eight days after the accident, as a correct representation of the roadway and the marks or scratches he saw in the pavement at the place in question; that the tractor was about 75 feet further east than the auto automobile; that it was upside down when he first saw it and a man was still in the cab, and Ruth still in the trunk; that he helped carry her from the car to the Curve Inn and then went over to the tractor; that "there was a lot of spilled gasoline around there. The truck was smashed and the gasoline tanks had burst." That he

motioned everyone away who had cigarettes; that in walking between the two wrecked vehicles he noticed some scratches that were about 3 feet south of the center of the pavement and ran southeast towards the tractor; that all the scratches were in the south or eastbound lane,

Plaintiffs then called E. G. Hickey, who testified that he went to the scene of the accident with three other persons, November, 22, 2 days after it occurred and that the photographs shown correctly represented the Inn, the roadway and the place in question. That he did not see the wreckage of any vehicle but saw a part of one; that there was an oil spot on the grass, off the south side of the pavement. Objection was then made by defendants' counsel and upon inquiry of the court, counsel for plaintiffs stated he expected to show by the witness the position of the marks in the pavement and the oil spot. The court sustained objection on the ground that "It is too remote" - two days after the accident. The witness then testified that he examined the pavement and found marks to the right or south of the center of the roadway; there were scratches 2, 3 or 4 feet long, some of them were 1/4 of an inch to 3/8 inches in depth. This was excluded on objection. He then testified the color of the marks was white, as the concrete would be; that the marks were pointing southeast from the center line. Counsel for plaintiffs then asked, "State whether or not these marks pointed in a direction off the highway or not". Objection to this was sustained. Afterward the witness stated, "They pointed out toward the outer edge of the highway". This was objected to and the objection sustained.

Plaintiff Joseph Rich, called in his own behalf, testified he was a brother of plaintiff, Mrs. Shennan; that on November 22, two days after the accident, he went to the hospital in La Porte

mentioned everyone away who had a car; that in relation between the two wrecked vehicles he noticed some scratches that were about 3 feet south of the center of the pavement and ran southeast towards the tractor; that all the scratches were in the south or eastbound lane.

Plaintiff then called J. G. Mickey, who testified that he went to the scene of the accident with three other persons, November 22, 2 days after it occurred and that the photographs shown correctly represented the inn, the roadway and the place in question. That he did not see the wreckage of any vehicle but saw a part of one; that there was an oil spot on the grass, off the south side of the pavement. Objection was then made by defendant's counsel and upon inquiry of the court, counsel for plaintiff stated he expected to show by the witness the position of the marks in the pavement and the oil spot. The court sustained objection on the ground that "It is too remote" - two days after the accident. The witness then testified that he examined the pavement and found marks to the right or south of the center of the roadway; there were scratches 2, 3 or 4 feet long, some of them were 1/4 of an inch to 3/8 inches in depth. This was excluded on objection. He then testified the color of the marks was white, as the concrete would be; that the marks were pointing south and from the center line. Counsel for plaintiff then asked, "Have whether or not these marks pointed in a direction off the highway or not?" Objection to this was sustained. Afterward the witness stated, "They pointed out toward the outer edge of the highway." This was objected to and the objection sustained.

Plaintiff Jacob H. Mohr, called in his own behalf, testified he was a brother of plaintiff, the deceased; that on November 22, two days after the accident, he went to the hospital in the town

to see his sister, Ruth; that he went with Elmer Rich and Mr. Hickey and his wife. He then identified the exhibits, being the photographs taken of the scene of the accident; that he examined the roadway and surroundings where the accident occurred; "I saw gouges in the pavement," that they were at the curve on the south side or eastbound lane about 2 to 2½ feet south of the dividing line; that the marks were white and clear and were from 1/4 to 3/8 of an inch deep. That "They were white and new looking". This latter testimony was objected to, the objection sustained and the answer stricken. That the gouges pointed toward the southeast in the eastbound lane, away from the center. The witness was then asked if he saw anything on the shoulder on the south side of the pavement. This was objected to because it was two days after the accident, and the objection was sustained.

We think the ruling of the court was erroneous and the evidence should have been admitted. The witness Beman, who was coming from Ohio to Chicago, and arrived at the scene of the accident immediately after it occurred, identified the photograph of the roadway taken November 28th, by Ralph Poole. This was the same photograph testified to by Hickey and Rich, and Beman testified that it represented the situation as he saw it at the time of the accident. His testimony and the testimony of Poole (who took Exhibit 4, on November 28, and who testified that the exhibit correctly represented the situation) together with that of Hickey and Rich, was sufficient to have the jury pass on the question. The evidence that the gouges were from 1 to 4 feet south of the center line running somewhat in a southeasterly direction, was some evidence tending to show that the north side of the tractor was over the center line.

to see his sister, Ruth; that he went with Elmer Rich and Mr. Hickey and his wife. He then identified the exhibits, being the photograph taken of the scene of the accident; that he examined the roadway and surroundings where the accident occurred; "I saw gouges in the pavement," that they were at the curve on the south side of eastbound lane about 2 to 2 1/2 feet south of the dividing line; that the marks were white and clear and were from 1/4 to 3/8 of an inch deep. That "They were white and new looking". This latter testimony was objected to, the objection sustained and the answer stricken. That the gouges pointed toward the southeast in the eastbound lane, away from the center. The witness was then asked if he saw anything on the shoulder on the south side of the pavement. This was objected to because it was two days after the accident, and the objection was sustained.

We think the ruling of the court was erroneous and the evidence should have been admitted. The witness Bowen, who was coming from Ohio to Chicago, and arrived at the scene of the accident immediately after it occurred, identified the photograph of the roadway taken November 28th, by Ralph Poole. This was the same photograph testified to by Hickey and Rich, and Bowen testified that it represented the situation as he saw it at the time of the accident. His testimony and the testimony of Poole (who took Exhibit 4, on November 28, and who testified that the exhibit correctly represented the situation) together with that of Hickey and Rich, was sufficient to have the jury pass on the question. The evidence that the gouges were from 1 to 4 feet south of the center line running somewhat in a southeasterly direction, was some evidence tending to show that the north side of the tractor was over the center line.

Beekley and Corboy, called by plaintiffs, testified they made an examination of the tractor which was in a garage at Hanna, Indiana, November 28, 8 days after the accident, but upon objection, the court refused to permit them to testify that they found a pocket of powdered, white-colored cement at the juncture of the right fender and right running board of the tractor, on the ground there was not sufficient preliminary proof that the condition of the tractor, at that time, was the same as immediately after the accident. We think this evidence should have been admitted. The tractor was not in the possession of plaintiffs or any one connected with them. There is other evidence touching this question but since we have reached the conclusion that there must be a new trial, we do not discuss it further.

Complaint is also made that the court permitted Alice Shoemake, who conducted the lunch room called the Curve Inn, at the place of the accident, to testify over objection that just before the accident she saw an automobile coming very fast westward in the north lane, east of the Inn; that just before it reached the curve and she "heard the sound of the car" she knew that that automobile was the one involved in the accident. And further, that after the accident Dustin Grannis, who was with Ruth in the car, told the witness that "down the highway * * * I looked and we were going 85 miles an hour". This last statement as to what Grannis told the witness was ruled out except as to Grannis whose case was being tried at the same time. We think there was no error in the ruling. The weight to be given to the evidence was for the jury.

A further point is made by counsel for plaintiffs that the court erroneously refused to permit the witness, McPharon, called in rebuttal to testify as an expert on the question of driving

Beckley and Co-boy, called by plaintiffs, testified they

made an examination of the tractor which was in a garage at Hanna, Indiana, November 28, 8 days after the accident, but upon objection, the court refused to permit them to testify that they found a pocket of powdered, white-colored cement at the junction of the right fender and right running board of the tractor, on the ground there was not sufficient preliminary proof that the condition of the tractor, at that time, was the same as immediately

after the accident. We think this evidence should have been admitted. The tractor was not in the possession of plaintiffs or any one connected with them. There is other evidence tending this question but since we have reached the conclusion that there must be a new trial, we do not discuss it further.

Complaint is also made that the court permitted Alice Hoffman, who conducted the lunch room called the Curve Inn, at the place of the accident, to testify over objection that just before the accident she saw an automobile coming very fast westward in the north lane, east of the Inn; that just before it reached the curve and she "heard the sound of the car," she knew that that automobile was the one involved in the accident. And further, that after the accident Dustin Grannia, who was with Ruth in the car, told the witness that "down the highway" "I looked and we were going 85 miles an hour". This last statement as to what Grannia told the witness was ruled out except as to Grannia whose case was being tried at the same time. We think there was no error in the ruling. The weight to be given to the evidence was for the jury.

A further point is made by counsel for plaintiffs that the court erroneously refused to permit the witness, McPherson, called in rebuttal to testify as an expert on the question of driving

tractors with and without trailers attached. On this question plaintiffs sought to show by the witness that a tractor without a trailer would have a tendency to "wander", resulting in a harder pull upon the operation of the front wheels and consequently greater difficulty in steering. We think the ruling was proper. It was too speculative and there was no evidence that the tractor "wandered".

Plaintiffs also sought to show by this witness that skid marks, which it was contended were made by the tractor at the time of the collision, would tend to indicate that the tractor was being driven at 50 miles per hour but on objection this was excluded. We think the ruling was erroneous and this, too, although the allegation of the complaint as to speed had been stricken at the close of plaintiffs' case on defendants' motion, for the reason that afterward defendants called Fred Borgardt, the driver of the tractor, who testified there was a governor on the tractor set at 38 miles an hour. He gave further testimony to the effect that just before the accident he was driving from 25 to 35 miles an hour. Defendants having introduced evidence as to the speed at which the tractor was traveling just before the accident, plaintiffs had the right in rebuttal to introduce evidence that tended to show that the tractor was going at a greater rate of speed.

Plaintiffs contend that the trial court gave too many instructions tendered by defendants concluding with the words, "Then you must find the defendants not guilty". Seven of such instructions were given. The court gave 32 instructions, 17 requested by plaintiffs and 15 tendered by defendants. The controlling issue was simple and we think the jury was not misled.

tractors with and without trailers attached. On this question plaintiffs sought to show by the witness that a tractor without a trailer would have a tendency to "wander", resulting in a harder pull upon the operation of the front wheels and consequently greater difficulty in steering. We think the ruling was proper. It was too speculative and there was no evidence that the tractor "wandered".

Plaintiffs also sought to show by this witness that skid marks, which it was contended were made by the tractor at the time of the collision, would tend to indicate that the tractor was being driven at 30 miles per hour but on objection this was excluded. We think the ruling was erroneous and this, too, although the allegation of the complaint as to speed had been stricken at the close of plaintiffs' case on defendants' motion, for the reason that afterward defendants called Fred Horgardt, the driver of the tractor, who testified there was a governor on the tractor set at 32 miles an hour. He gave further testimony to the effect that just before the accident he was driving from 25 to 32 miles an hour. Defendants having introduced evidence as to the speed at which the tractor was traveling just before the accident, plaintiffs had the right in rebuttal to introduce evidence that tended to show that the tractor was going at a greater rate of speed.

Plaintiffs contend that the trial court gave too many instructions tendered by defendants concluding with the words, "Then you must find the defendants not guilty". Even if such instructions were given. The court gave 32 instructions, 17 requested by plaintiffs and 15 tendered by defendants. The controlling issue was simple and we think the jury as not misled.

A further complaint is made to instruction No. 4, given at defendants' request. By it the jury were told that before Mrs. Shennan could recover she must prove by a preponderance of the evidence (1) that she was in the exercise of due care, (2) that defendants were guilty of negligence in operating the tractor; and (3) that such negligence of the defendants, if any, was the proximate cause of the damages complained of by Mrs. Shennan. The objection to this instruction as stated by counsel is that, "As a matter of law, contributory negligence sufficient to bar a recovery is that negligence of plaintiff which contributes proximately to the injury". We think the objection is hypercritical. The instruction is a stock instruction given in many cases of a character similar to the case at bar. We think the instruction was proper.

For the ruling on the admission and exclusion of evidence, as above mentioned, the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P.J., and McSurely, J., concur.

A further complaint is made to instruction No. 4, given at defendants' request, by it the jury were told that before Mrs. Shennan could recover she must prove by a preponderance of the evidence (1) that she was in the exercise of due care, (2) that defendants were guilty of negligence in operating the trolley, and (3) that such negligence of the defendants, if any, was the proximate cause of the damages complained of by Mrs. Shennan. The objection to this instruction as stated by counsel is that "As a matter of law, contributory negligence sufficient to bar a recovery is that negligence of plaintiff which contributed proximately to the injury". We think the objection is hypercritical. The instruction is a stock instruction given in many cases of a character similar to the case at bar. We think the instruction was proper.

For the ruling on the admission and exclusion of evidence, as above mentioned, the judgment of the superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P.J., and McDevitt, J., concur.

42313

316 I.A. 160²

W. W. DAVIESS,
Appellant,

v.

JAMES P. HARDING; JOHN
P. HARDING; HARDING HOTELS,
INC., a corporation; 247 E.
ONTARIO CORPORATION, a cor-
poration; JOHN P. HOOKER and
FRANK S. SLOSSON, doing business
as HOOKER & SLOSSON,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order of the trial court sustaining defendants' motion to strike plaintiff's amended complaint and its decree dismissing same for want of equity.

This proceeding was instituted February 1, 1939 by plaintiff, W. W. Daviess, against James P. Harding, John P. Harding and Harding Hotels, Inc. (hereinafter for convenience referred to collectively as the Hardings), 247 E. Ontario Corporation, John P. Hooker and Frank S. Slosson, doing business as Hooker & Slosson. Plaintiff's original complaint having been stricken on defendants' motion, he filed an amended complaint June 20, 1939.

The amended complaint alleged substantially that the Hardings were desirous of purchasing the equity in the property at 247 East Ontario street, Chicago, as well as the second mortgage outstanding against said property; that on August 1, 1937, they entered into a contract with Hooker & Slosson, real estate brokers, whereby the Hardings undertook to pay said brokers a fee of \$5,000 if the latter consummated the purchase of said second mortgage and equity upon terms specified by the Hardings; that the second mortgage and equity were to be purchased in the name of 247 East Ontario Corporation which the Hardings proposed to organize; that Hooker & Slosson in turn entered into a contract with plaintiff, a real estate salesman,

3151A.100

42313

W. W. DAVIES,
Appellant,

v.

JAMES P. HARDING, JOHN
P. HARDING, HARDING HOTELS,
INC., a corporation; 247 E.
ONTARIO CORPORATION, a cor-
poration; JOHN P. HOOKER and
FRANK S. GLESSON, doing business
as HOOKER & GLESSON,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FULLER DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order of the trial court
sustaining defendants' motion to strike plaintiff's amended com-
plaint and its decree dismissing same for want of equity.

This proceeding was instituted February 1, 1939 by plain-
tiff, W. W. Davies, against James P. Harding, John P. Harding
and Harding Hotels, Inc. (hereinafter for convenience referred
to collectively as the Hardings), 247 E. Ontario Corporation,
John P. Hooker and Frank S. Glesson, doing business as Hooker &
Glesson. Plaintiff's original complaint having been stricken
on defendants' motion, he filed an amended complaint June 20,
1939.

The amended complaint alleged substantially that the
Hardings were desirous of purchasing the equity in the property
at 247 East Ontario street, Chicago, as well as the second
mortgage outstanding against said property; that on August 1,
1937, they entered into a contract with Hooker & Glesson, real
estate brokers, whereby the Hardings undertook to pay said
brokers a fee of \$5,000 if the latter consummated the purchase
of said second mortgage and equity upon terms specified by the
Hardings; that the second mortgage and equity were to be pur-
chased in the name of 247 East Ontario Corporation which the
Hardings proposed to organize; that Hooker & Glesson in turn
entered into a contract with plaintiff, a real estate salesman,

whereby they agreed to pay him one-half of the \$5,000 commission after they had received same, if Daviess performed all the services necessary to consummate the purchase for the Hardings of the second mortgage and equity on the terms specified; that plaintiff did perform such services, purchased the second mortgage and equity in behalf of the Hardings who advanced the purchase price for same and that plaintiff caused the second mortgage to be assigned and the equity transferred and conveyed to the 247 East Ontario Corporation; that the contracts between plaintiff and Hooker & Slosson and between the latter and the Hardings were fully performed on the part of both plaintiff and Hooker & Slosson prior to November 1, 1937 at which time Hooker & Slosson rendered a statement for their \$5,000 brokerage fee to the Hardings, which the latter have failed and refused to pay; that although plaintiff has made repeated demands upon Hooker & Slosson to institute suit against the Hardings to recover the \$5,000 commission due them, Hooker & Slosson have failed and refused to do so; that one-half of said \$5,000 commission due and owing to Hooker & Slosson is in equity due and owing to plaintiff. The complaint concluded with the specific prayer that the Hardings "shall be decreed to pay the said sum of \$5,000, together with interest thereon from November 1, 1937 and that one-half of said sum shall be paid directly to John P. Hooker and Frank S. Slosson, doing business as Hooker & Slosson, and one-half of said sum shall be paid directly to plaintiff." The amended complaint also prayed for general equitable relief. As heretofore stated defendants' motion to strike the amended complaint was allowed.

Plaintiff's theory, as stated in his brief, is that "the promise of Hooker & Slosson, real estate brokers, to pay to the plaintiff one-half of the commission Hooker & Slosson were to receive from James P. Harding, John P. Harding, Harding Hotels, Inc., and 247 East Ontario Corporation, is an enforceable agree-

whereby they agreed to pay him one-half of the \$2,000 commission after they had received same, if business performed all the services necessary to consummate the purchase for the Hardings of the second mortgage and equity on the terms specified; that plaintiff did perform such services, purchased the second mortgage and equity in behalf of the Hardings who advanced the purchase price for same and that plaintiff caused the second mortgage to be assigned and the equity transferred and conveyed to the City of Ontario Corporation; that the contracts between plaintiff and Hooker & Slosson and between the latter and the Hardings were fully performed on the part of both plaintiff and Hooker & Slosson prior to November 1, 1937 at which time Hooker & Slosson rendered a statement for their \$2,000 brokerage fee to the Hardings, which the latter have failed and refused to pay; that although plaintiff has made repeated demands upon Hooker & Slosson to institute suit against the Hardings to recover the \$2,000 commission due them, Hooker & Slosson have failed and refused to do so; that one-half of said \$2,000 commission due and owing to Hooker & Slosson is in equity due and owing to plaintiff. The complaint concluded with the specific prayer that the Hardings "shall be decreed to pay the said sum of \$2,000, together with interest thereon from November 1, 1937 and that one-half of said sum shall be paid directly to John P. Hooker and Frank B. Slosson, doing business as Hooker & Slosson, and one-half of said sum shall be paid directly to plaintiff." The amended complaint also prayed for general equitable relief. As heretofore stated defendants' motion to strike the amended complaint was allowed. Plaintiff's theory, as stated in his brief, is that "the promise of Hooker & Slosson, real estate brokers, to pay to the plaintiff one-half of the commission Hooker & Slosson were to receive from James P. Harding, John P. Harding, Harding Hotels, Inc., and City of Ontario Corporation, is an enforceable agreement."

ment;" that "since Hooker & Slosson have neglected to institute suit upon the claim, plaintiff is entitled to relief in equity as a partial assignee;" and that "the court erred in dismissing plaintiff's complaint for want of equity."

The position of the Hardings is that "the amended complaint of the plaintiff stated no cause of action against the defendants;" and that "the alleged promise of Hooker & Slosson to pay to the plaintiff one-half of the commissions they might receive from the defendants was but a mere personal agreement, and did not constitute an equitable assignment of any claim of Hooker & Slosson against the defendants."

Plaintiff asserts: "Defendants, Hardings, contracted with Hooker & Slosson, brokers, to pay them \$5,000 commission for certain services as brokers. Plaintiff, a licensed real estate salesman, performed all of the said services under an agreement with Hooker & Slosson, whereby the latter undertook to pay plaintiff one-half of the \$5,000 when received." Plaintiff has performed all of said services and his right cannot be defeated because Hooker & Slosson have declined to sue the other defendants."

The defendants, Hardings, urge that "the alleged promise of Hooker & Slosson to pay the plaintiff one-half of the commission, to be paid by the defendant when earned, did not constitute an equitable assignment of any portion of the claim of Hooker & Slosson for such commission, but was merely a personal agreement between the plaintiff and Hooker & Slosson."

The only question presented for determination is whether the agreement between plaintiff and Hooker & Slosson amounted to an equitable assignment of one-half of Hooker & Slosson's claim against the Hardings or whether it merely created the relationship of creditor and debtor between plaintiff and Hooker & Slosson when the latter collects the \$5,000 commission from the Hardings.

In Wyman v. Snyder, 112 Ill. 99, where the facts were

ment; that "since Hooker & Slosson have neglected to institute suit upon the claim, plaintiff is entitled to relief in equity as a partial assignee;" and that "the court erred in dismissing plaintiff's complaint for want of equity."

The position of the Hardings is that "the amended complaint of the plaintiff stated no cause of action against the defendants;" and that "the alleged promise of Hooker & Slosson to pay to the plaintiff one-half of the commissions they might receive from the defendants was but a mere personal agreement, and did not constitute an equitable assignment of any claim of Hooker & Slosson against the defendants."

Plaintiff asserts: "Defendants, Hardings, contracted with Hooker & Slosson, brokers, to pay them \$2,000 commission for certain services as brokers. Plaintiff, a licensed real estate salesman, performed all of the said services under an agreement with Hooker & Slosson, whereby the latter undertook to pay plaintiff one-half of the \$2,000 when received. Plaintiff has performed all of said services and his right cannot be defeated because Hooker & Slosson have declined to sue the other defendants."

The defendants, Hardings, urge that "the alleged promise of Hooker & Slosson to pay the plaintiff one-half of the commission, to be paid by the defendant when earned, did not constitute an equitable assignment of any portion of the claim of Hooker & Slosson for such commission, but was merely a personal agreement between the plaintiff and Hooker & Slosson."

The only question presented for determination is whether the agreement between plaintiff and Hooker & Slosson amounted to an equitable assignment of one-half of Hooker & Slosson's claim against the Hardings or whether it merely created the relationship of creditor and debtor between plaintiff and Hooker & Slosson when the latter collect the \$2,000 commission from the Hardings.

practically identical with the facts here, it was held that if there was simply a personal undertaking on the part of the original broker to pay the sub-broker or salesman one-half of the commission said original broker collected on the transaction such an agreement was insufficient to constitute an equitable assignment of one-half of such commission. The Wyman case holds squarely that such an agreement as the plaintiff herein made with Hooker & Slosson that they would pay him one-half of the \$5,000 commission when they received or collected same does not operate as an equitable assignment of that portion of the commission which they merely personally agreed to pay him.

An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, equity will recognize and protect. To constitute an equitable assignment there must be an actual appropriation of the fund, or of some designated part, portion or per cent of it. (Story v. Hull, 143 Ill. 506.) In the Story case the court said at p. 511:

"Appellant wholly ignores the distinction, which is clearly pointed out in Wyman v. Snyder, 112 Ill. 99, and also in Trist v. Child, 21 Wall. 441, between an actual assignment of a part of a debt or claim or fund, and a mere promise or agreement to pay a part of such debt or claim when collected or recovered, or pay out of such fund."

In Hibernian Banking Ass'n v. Davis, 295 Ill. 537, where the question of what constituted an equitable assignment was presented, the court said at p. 545:

"Counsel, however, lose sight of the difference between an actual assignment or appropriation of the fund and a mere promise or agreement to pay out of a certain fund when it shall be collected or recovered. It is only where there is an actual appropriation of the fund that an equitable assignment arises. It does not arise from a promise to pay out of a certain fund when such shall be created. Story v. Hull, 143 Ill. 506; Cameron v. Boeger, 200 Ill. 84."

(To the same effect are Farmers State Bank v. Kidd, 313 Ill. App. 132; Bell & Howell Co. v. Spoor, 225 Ill. App. 256; Freeman v. Equitable Life Assurance Society, 304 Ill. App. 517; Armstrong

practically identical with the facts here, it is held that if there was simply a personal undertaking on the part of the original broker to pay the sub-broker or salesman one-half of the commission said original broker collected on the transaction such an agreement was insufficient to constitute an equitable assignment of one-half of such commission. The Young case holds squarely that such an agreement as the plaintiff herein had with Becker & Blosson that they would pay him one-half of the \$5,000 commission when they received or collected same does not operate as an equitable assignment of that portion of the commission which they merely personally agreed to pay him.

An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, equity will recognize and protect. To constitute an equitable assignment there must be an actual appropriation of the fund, or of some designated part, portion or per cent of it. (Story v. Hill, 143 Ill. 506.) In the Story case the court said at p. 511:

"Appellant wholly ignores the distinction, which is clearly pointed out in Young v. Becker, 112 Ill. 99, and also in Smith v. Hill, 21 Wall. 441, between an actual assignment of a part of debt or claim or fund, and a mere promise or agreement to pay a part of such debt or claim when collected or recovered, or pay out of such fund."

In Hibernian Bank v. Davis, 202 Ill. 527, where

the question of what constituted an equitable assignment was presented, the court said at p. 547:

"Concessed, however, loss sight of the difference between an actual assignment or appropriation of the fund and a mere promise or agreement to pay out of a certain fund when it shall be collected or recovered. It is only where there is an actual appropriation of the fund that an equitable assignment arises. It does not arise from a promise to pay out of a certain fund when such shall be created. Story v. Hill, 143 Ill. 506; Young v. Becker, 200 Ill. 84."

(To the same effect are Farmers State Bank v. Kidd, 313 Ill. App. 132; Bell & Howell Co. v. Boor, 225 Ill. App. 256; Wesman v. Equitable Life Assurance Society, 304 Ill. App. 517; Wesman

v. Zounis, 304 Ill. App. 537.)

In support of his position that his agreement with Hooker & Slosson did constitute an equitable assignment of one-half of the \$5,000 commission plaintiff relies principally upon Lewis v. Braun, 356 Ill. 467. The facts in that case are not comparable to the facts here. There the court held that the facts were such as to establish an equitable assignment. Here no facts are alleged other than the mere personal promise of Hooker & Slosson to pay plaintiff \$2,500 out of their \$5,000 commission when they collected same from the Hardings.

Plaintiff also cites Schwartz v. Tuchman, 232 Mich. 345. That case is not in point. There a partial assignment was admittedly made and the only question was whether it was enforceable without the debtor's assent.

Under the established law of this state plaintiff's agreement with Hooker & Slosson did not operate as an equitable assignment of a portion of the debt due from the hardings to Hooker & Slosson but merely obligated Hooker & Slosson to pay plaintiff one-half of the \$5,000 commission when they collected it. /

Under the facts alleged in plaintiff's amended complaint the Hardings are clearly obligated to pay Hooker & Slosson a commission of \$5,000 and have been since November 1, 1937. Hooker & Slosson are obligated to pay plaintiff one-half of said \$5,000 when they receive same. The Hardings have persisted in their refusal to pay the \$5,000 commission to Hooker & Slosson, and Hooker & Slosson have just as persistently refused to compel the payment of same through appropriate legal proceedings. It does not appear why Hooker & Slosson have not instituted legal proceedings to collect the \$5,000 commission from the Hardings who are unquestionably solvent. If plaintiff had alleged in his complaint facts which showed or tended to show that Hooker & Slosson

In support of his position that his agreement with Hooker & Slosson did constitute an equitable assignment of one-half of the \$5,000 commission plaintiff relies principally upon Levis v. Brown, 356 Ill. 467. The facts in that case are not comparable to the facts here. There the court held that the facts were such as to establish an equitable assignment. Here no facts are alleged other than the mere personal promise of Hooker & Slosson to pay plaintiff \$2,500 out of their \$5,000 commission when they collected same from the Hardings.

Plaintiff also cites Debanis v. Johnson, 232 Mich. 347.

That case is not in point. There a partial assignment was admittedly made and the only question was whether it was enforceable without the debtor's assent.

Under the established law of this state plaintiff's agreement with Hooker & Slosson did not operate as an equitable assignment of a portion of the debt due from the Hardings to Hooker & Slosson but merely obligated Hooker & Slosson to pay plaintiff one-half of the \$5,000 commission when they collected it. Under the facts alleged in plaintiff's amended complaint the Hardings are clearly obligated to pay Hooker & Slosson a commission of \$5,000 and have been since November 1, 1937. Hooker & Slosson are obligated to pay plaintiff one-half of said \$5,000 when they receive same. The Hardings have refused in their refusal to pay the \$5,000 commission to Hooker & Slosson, and Hooker & Slosson have just as persistently refused to compel the payment of same through appropriate legal proceedings. It does not appear why Hooker & Slosson have not instituted legal proceedings to collect the \$5,000 commission from the Hardings who are unquestionably solvent. If plaintiff had alleged in his complaint facts which showed or tended to show that Hooker & Slosson

had failed and refused to sue the Hardings because of connivance or collusion between the former and the latter, an entirely different question would have been presented.

We are forced to hold that since the agreement between plaintiff and Hooker & Slosson did not operate as an equitable assignment of one-half of the commission due Hooker & Slosson from the Hardings, no liability can be imposed upon the latter under the complaint filed in this proceeding.

No question was raised in this case as to whether or not Hooker ^{and} Slosson are directly liable to plaintiff.

For the reasons stated herein the order and decree of the Circuit court of Cook county are affirmed.

ORDER AND DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

-4-

had failed and refused to sue the Harding because of conspiracy or collusion between the former and the latter, in entirely different question would have been presented.

We are forced to hold that since the agreement between plaintiff and Hooker & Blosson did not operate as an equitable assignment of one-half of the consideration due Hooker & Blosson from the Harding, no liability can be imposed upon the latter under the complaint filed in this proceeding.

No question was raised in this case as to whether or not Hooker and Blosson are directly liable to plaintiff.

For the reasons stated herein the order and decree of the Circuit Court of Cook County are affirmed.

ORDER AND DECREE AFFIRMED.

Friend and Seelman, JJ., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of May, in
the year of our Lord one thousand nine hundred and forty-two
within and for the Second District of the State of Illinois:

Present --- The Hon. BLAINE HUFFMAN, Presiding Justice

Hon. FRANKLIN R. DOVE, Justice

Hon. FRED G. WOLFE Justice

E. J. WELTER, Sheriff

JUSTUS L. JOHNSON, Clerk

316 I.A. 306¹

BE IT REMEMBERED, that afterwards, to-wit: On September 17,
1942, the Opinion of the Court was filed in the Clerk's Office
of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, 1942

316 I.A. 306

WESTMORE SUPPLY COMPANY,
a corporation,

v.

EUGENE L. FRUM, et al.

CHICAGO TITLE AND TRUST
COMPANY, a corporation,

v.

WESTMORE SUPPLY COMPANY,
a corporation, et al.

WALTER R. YOUNGBERG, County
Treasurer, etc., et al.,

Appellees,

v.

KUENZEL & FRYE, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT OF

DU PAGE COUNTY.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

3161A.308

May Term, 1942

APPEAL FROM
CIRCUIT COURT OF
DU PAGE COUNTY.

(ESTMORE SUPPLY COMPANY,
(corporation,
(
(v.
(UGENE L. FRUM, et al.
(
(
(CHICAGO TITLE AND TRUST
(COMPANY, a corporation,
(
(v.
(ESTMORE SUPPLY COMPANY,
(corporation, et al.
(
(
(ALGER R. YOUNGBERG, County
(Treasurer, etc., et al.,
(
(Appellees,
(
(v.
(UENZEL & FRYE, a corporation,
(
(Appellant.

This case involves the question of the right of appellant, assignee of a lease, to remove certain equipment placed in the leased premises by it and the lessees, under the terms of a lease executed by receivers appointed by the court in a pending cause.

The question arose in a suit instituted by Westmore Supply Company in the circuit court of Du Page County to foreclose a mechanics' lien on certain premises in the Village of Villa Park, improved with a building constructed for use as a theatre, garage and other business purposes. In that suit the Chicago Title and Trust Company filed a cross-bill to foreclose a trust deed. In January, 1928, the court appointed the Chicago Title and Trust Company and Chester R. Davis receivers of the premises and authorized them to rent or lease the premises.

The receivers, on September 1, 1933, and annually thereafter until August 31, 1938, leased the premises to E. W. Kuenzel and W. F. Frye, partners doing business as Kuenzel & Frye. On July 28, 1938, a three year lease beginning August 31, 1938 and expiring August 31, 1941 was entered into with the approval of the court. On June 23, 1939, with the lessor's assent, the lease was assigned to Kuenzel & Frye, the appellant corporation. The lease provides that the covenants and agreements therein shall be binding upon, apply and inure to the benefit of the successors and assigns of the parties thereto, and that the lessor shall have the privilege of cancellation at any time by giving sixty days' notice to quit. The sixth clause thereof provides: "That lessee shall not attach, affix or exhibit * * * any articles of permanent character to any window, floor, ceiling, door or wall in any place in or about said premises,

This case involves the question of the right of a landlord to remove certain equipment placed in the leased premises by it and the lessees, under the terms of a lease executed by receivers appointed by the court in a pending case.

The question arose in a suit instituted by Western Supply Company in the circuit court of Tupea County to foreclose a mechanics' lien on certain premises in the village of Villa Park, improved with a building constructed for use as a theatre, and other business purposes. In that suit the Chicago Title and Trust Company filed a cross-bill to foreclose a trust deed. In January, 1938, the court appointed the Chicago Title and Trust Company and Chester R. Davis receivers of the premises and authorized them to rent or lease the premises.

The receivers, on September 1, 1938, and annually thereafter until August 31, 1938, leased the premises to E. W. Kuenzel and E. W. Frye, partners doing business as Kuenzel & Frye. On July 8, 1938, a three year lease beginning August 31, 1938 and ending August 31, 1941 was entered into with the receivers of the court. On June 23, 1938, with the lessor's consent, the lease was assigned to Kuenzel & Frye, the apartment corporation. The lease provides that the covenants and agreements therein shall be binding upon, jointly and severally to the benefit of the lessors and assigns of the parties thereto, and that the lessor shall have the privilege of cancellation at any time by giving sixty days' notice in writing. The lease further provides: "That lessee shall not attach, affix or exhibit * * * any articles of personal character to any window, door, ceiling, floor or wall in any place in or about said premises,

or upon any of the appurtenances thereof; * * * and shall make no changes or alterations in the premises by the erection of partitions or the papering of walls, or otherwise, without in each case, the consent in writing of lessor first had thereto; that all the erections, additions, fixtures and improvements, whether temporary or permanent in character (except only the movable trade and/or office furniture of lessee), made in or upon said premises, either by the lessee or the lessor, shall be the lessor's property, and shall remain upon said premises at the termination of the term hereof by lapse of time or otherwise, without compensation therefor to the lessee." Rider "A" attached to the lease provides: "That the lessee shall entirely at his own cost and expense during the term hereof, do all decorating, installing, repairing, replacing and adjusting on the interior and exterior of the demised premises, including boiler and roof, necessary for any reason whatsoever. That any and all installations made in the demised premises, as a result of the work to be done by the Lessee as hereinbefore specified, shall, as of the date of such installation, become a part of the real estate and the property of the Lessors, and shall remain in the demised premises at the expiration of this lease by lapse of time or otherwise." The lease also contained the following provision: "In addition to the Lessee's obligations under this lease and Rider "A" hereto attached, Lessee shall, to the reasonable satisfaction of Lessor, complete the following work on or before October 31, 1938: - 1 - Make the necessary repairs to roof. 2- install a new hot water storage tank. In the event Lessee fails to comply with the provisions of this paragraph, the Lessor shall have the right to complete this work and charge the cost thereof to the Lessee. The said cost shall become as additional rent for the month following the completion of the said work by the Lessor and shall be payable to the Lessor upon demand."

and shall make no
changes or alterations in the premises by the erection of partitions
or the opening of walls, or otherwise, without in each case, the
consent in writing of lessor first had thereto; that all the erec-
tions, additions, fixtures and improvements, whether temporary or
permanent in character (except only the movable trade and/or office
furniture of lessee), made in or on a said premises, either by the
lessee or the lessor, shall be the lessor's property, and shall
remain upon said premises at the termination of the term hereby pro-
vided for, without compensation therefor to the
lessee. Rider "A" attached to the lease provides: "That the lessee
shall entirely at his own cost and expense during the term hereof, do
all decorating, installing, repairing, replacing and adjusting on the
interior and exterior of the demised premises, including boiler and
cool, necessary for any reason whatsoever. That any and all installa-
tions made in the demised premises, as a result of the work to be done
by the lessee as hereinbefore recited, shall, at the expiration of the
installation, become a part of the real estate and the property of the
lessor, and shall remain in the demised premises at the expiration of
the lease by lease of time or otherwise." The lease also contained
the following provision: "In addition to the lessee's obligations under
the lease and Rider "A" hereto attached, lessee shall, at the reason-
able satisfaction of lessor, complete the following work on or before
October 31, 1938: - 1 - Make the necessary repairs to roof. 2 - Install
new hot water storage tank. In the event lessor fails to comply
with the provisions of this paragraph, the lessor shall have the right
to complete this work and charge the cost thereof to the lessee. The
aid cost shall become an additional cost for the term hereof, and the
completion of the said work by the lessor shall be subject to the
lessor's demand."

There were no seats in the theatre portion of the building. Some time after the lease was made, Mr. Kuenzel, one of the lessees, went to the Chicago Title and Trust Company and asked permission to put a roller skating floor in that part of the building. Mr. Bell, of that Company, told him to come back later and they would let him know. Upon his return Mr. Bell told him: "You go in and put in that floor and take it out any time." Construction of the floor was begun in the latter part of May, 1939, and finished a month later. This floor is about 60 x 90 feet, a small space being left on each side to allow for expansion. The skating surface is nailed to shiplap laid on 2"x10" floor joists resting on 8"x8" stringers supported on 6"x6" posts resting on the concrete floor and cut in various lengths to accommodate the slant in the concrete floor. The shiplap was brought to the level of the stage, the finished floor was carried over the rough stage boards, and the skating area includes the stage. Other than where the finished flooring is nailed to the stage floor, no part of the roller skating floor or the structure supporting it is nailed or attached to the building in any way.

Appellant also installed a Hercules hot water boiler to heat the garage. It was used about three months in 1939. At the time of the hearing it was not in use or connected in any way, but sat upon the basement floor. A Whiting stoker, not attached to the building, but set into the boiler was used for heating the main part of the building and a coal fired hot water heater was used for the apartments upstairs and the beauty parlor on the first floor. A Modine blower unit to heat the skating rink, and toilets in the ladies' and the mens' rest room were also put in by the lessees or by appellant.

There were no seats in the theatre portion of the building. At the time after the lease was made, Mr. Kuenzel, one of the lessees, wrote to the Chicago Title and Trust Company and asked permission to use a roller skating floor in that part of the building. Mr. Bell, that Company, told him to come back later and they would let him know. Upon his return Mr. Bell told him: "You go in and out in that way and take it out any time." Construction of the floor was begun in the latter part of May, 1932, and finished a month later. This floor is about 60 x 90 feet, a small space being left on each side to allow for expansion. The skating surface is raised to a height of 2' x 10" floor joists resting on 2"x8" stringers supported on 8"x8" posts resting on the concrete floor and out in various lengths to accommodate the skater in the concrete floor. The skater was brought to the level of the stage, the finished floor was carried over the stage boards, and the skating area includes the stage. Other than where the finished flooring is nailed to the stage floor, no part of the roller skating floor or the structure supporting it is nailed or attached to the building in any way. Appellant also installed a Hercules hot water boiler to heat the stage. It was used about three months in 1932. At the time of the trial it was not in use or connected in any way, but set upon the second floor. A heating boiler, not attached to the building, but set upon the boiler was used for heating the main part of the building and local fired hot water heater was used for the apartment relative and a beauty parlor on the first floor. A heating boiler unit located the skating rink, and toilet in the ladies' and the men's rest room were put in by the lessees or by appellant.

On June 13, 1941, Walter R. Youngberg, County Treasurer and Ex-officio Collector, was appointed receiver of the premises for the purpose of collecting over \$12,000.00 delinquent taxes, and the former receivers were discharged. On August 18th of that year, on motion of the successor receiver, he was authorized to enter into a lease with appellant, expiring June 30, 1944, and to insert therein such provisions, covering, among other things, removal of articles installed by the tenant, as the receiver might deem necessary or expedient for the proper protection of the property. Pursuant to the order, a lease was executed, providing that the skating rink floor and the other equipment mentioned might be removed by the lessee at any time during the term of the lease, provided, the premises were returned to the condition which obtained before the equipment was installed. On September 19, 1941, the court entered an order vacating the order of August 18th.

On October 3, 1941, the receiver filed a petition, reciting that the equipment was claimed by appellant, that other parties claimed such equipment is part of the real estate and that appellant was willing to enter into a lease with the right to remove the equipment at its termination. The petition prayed that the court determine the ownership and character of the equipment, and authorize the proposed lease to appellant, or a lease to some other tenant. Appellant filed a cross-petition alleging it notified the former receivers that they contemplated installing such equipment as would make the theatre portion of the building usable as a skating rink and that they considered such equipment would be trade fixtures removable at the end of the term and that the receivers agreed thereto. The cross-petition alleged that the equipment can be removed without injury to the premises and

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prayed the proposed lease be approved, or that appellant be allowed to remove the equipment. On the hearing the court found that the equipment belongs to the owners of the premises and dismissed the cross-petition for want of equity. To reverse the decree this appeal is prosecuted.

No complaint is made of the order of September 19, 1941, which vacated the order of August 18, 1941. This leaves the question of the ownership and the character of the equipment and the right of removal, to be determined from the lease of July 28, 1938, with the former receivers, which the parties hereto agree was entered into with the approval of the court.

Appellees rely upon Rider "A", leaving out of consideration the provision in the sixth clause of the lease: "(except only the movable trade and/or office furniture of lessee.)". There can be no doubt that the sixth clause thereby excludes from its terms all trade fixtures installed by the lessees. It is noticeable that Rider "A" provides that the lessee shall "do all decorating, installing, repairing, replacing and adjusting on the interior and exterior of the demised premises, including boiler and roof, necessary for any reason whatsoever." Another provision of the lease is that on or before October 31, 1938, the lessee shall: 1st, make the necessary repairs to the roof; 2nd, install a new hot water storage tank. This hot water storage tank is the only new equipment called for by the lease. It is not claimed that it was intended that a new roof should be installed and the clause mentioned expressly refers only to its repair. The roof and the boiler are mentioned together in Rider "A". We think a fair interpretation of its terms is that it refers to the installation of repairs, replacements and adjustments on the boiler then in use, as well as to the roof, and not to the installation of a new boiler. When Rider "A" is considered with the exception in clause Sixth, it is obvious that the word "installations" in Rider "A" has no reference to trade fixtures.

The testimony and the manner in which the skating rink floor is constructed show it can be removed without any damage to the building, except inconsequential nail holes in the rough floor of the stage. The testimony also shows that the stoker was installed by removing the grates and front door of the boiler, putting the burner and conduits therein and placing fire brick around it and soft cement putty around the front; that these and the hopper can readily be

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owed to remove the equipment. On the hearing the court found
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etc agree was entered into with the approval of the court.

Appellees rely upon Rider "A", leaving out of consideration
provision in the sixth clause of the lease: "(except only
provide for the use of office furniture of lessee.)". There
be no doubt that the sixth clause sharply excludes
its terms all things installed by the lessee. It
noticeable that Rider "A" provides that the lessee shall "be
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sidered with the exception in clause fifth, it is obvious that
word "installations" in Rider "A" has no reference to these
three.

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and it and soft cement putty around the front; that more
the hopper can readily be

removed and the boiler put into its original condition; that the Modine blower until in the skating rink is hung by rods from the roof trusses and attached to a steam pipe from the boiler. Appellant concedes it is not entitled to remove the toilets.

A coal fired hot water heater was installed by the lessees when they first moved into the premises. Mr. Kuenzel testified it had been replaced on an average of once a year, due to corrosion by the hard water of the Village. Appellant's verified cross-petition includes in the list of equipment installed by it, advertising signs for the rink. There is no testimony concerning them. There is no dispute as to furnishings in apartments, not owned by the tenants.

It is apparent that all the equipment in controversy, including the advertising signs, was installed by appellant (or its predecessors) in and as accessories to the business in which they were engaged. As between landlord and tenant, removable trade fixtures may include all erections made for the purpose of trade during tenancy which he may have attached to the freehold while in possession. The rule is liberal in favor of the tenant. (Baker v. McClurg, 198 Ill. 28.) The early decisions in England, as well as in this country, were very firm in holding that when personal property became a fixture by annexation to the real estate by some permanent method the personal property lost its identity as such and became real estate. The more modern decisions have broken away from this rule and a more liberal construction is now given in favor of holding fixtures personal property where that intent can be gathered from the conduct or actions of the parties. (National Bank of the Republic v. Wells-Jackson Corporation, 358 Ill. 356; Thuma v. Granada Hotel Corporation, 269 Ill. App. 484.)

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 gathered from the conduct or actions of the parties. (National Bank
 the Republic v. Vella-Jackson Corporation, 368 Ill. 566; Evans v.
 naga Hotel Corporation, 369 Ill. 484.)

Appellees' claim that the testimony in this respect was improper as a parol attempt to vary the terms of the lease is without foundation. It did not tend to vary the terms but was in line with clause sixth. Moreover, the abstract does not show that any objection to it was made.

Section 34 of the Landlord and Tenant act (Ill. Rev. Stat. 1941, chap. 80, par. 34,) provides:

"Subject to the right of the landlord to distrain for rent a tenant shall have the right to remove from the demised premises all removable fixtures erected thereon by him during the term of his lease, or of any renewal thereof, or of any successive leasing of the premises while he remains in possession in his character as tenant."

Such right is upheld in *Hopwood v. Green*, 310 Ill. App. 411.

As the lien of the trust deed and the rights of the lien claimant had attached in the instant case before the equipment was installed, their security would not be impaired and they would not be injured in any way by the removal of the equipment. One holding a mortgage on real estate has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels, and is not entitled to the property of others. (*Thuma v. Granada Hotel Corporation*, supra.)

The following things have been held to be trade fixtures and removable by the tenant: Wall sheeting nailed to strips which were in turn nailed to walls; an office partition attached to wainscot and ceiling by quarter round moulding; cold storage room with strips nailed to wall and floor; a partition with a door in it. (*Ward v. Earl*, 86 Ill. App. 635). A scale house and two bins to hold crushed stone; a lunch room and office. (*Hopwood v. Green*, supra.) "Ozite" carpet padding glued to floor; "In-a-door" beds, china and kitchen cases. (*Thuma v. Granada Hotel Corporation*, supra.) A sprinkler system installed in a garage. (*National Bank of the Republic v. Wells-Jackson Corporation*, supra.) Three ovens, one of them extending from basement

foundation through first and second story of the building through openings left when the building was built; a boiler enclosed in a brick jacket; an engine, shafting, pulleys and wheels. (Baker v. McClurg, supra.)

Appellees urge that because the rink floor was specially constructed for use in the theatre and might be injured in its removal indicates it was intended to constitute a part of the real estate, citing 26 C. J. sec. 15, p. 664 and Owings v. Estes, 256 Ill. 553, Manifestly that doctrine does not apply when the intention to treat it as personal property is expressed between the parties, as it was here. The property removed was injured in the Ward case, the Thuma case, the Baker case and the Hopwood case, but the right to remove the property was nevertheless upheld. In the Thuma case and in the Baker case the court held that while the removal of the equipment would cause some injury to it, that fact would not affect the right to remove it. That holding applies here. If anybody is injured by removing the equipment it will be appellant only, and no one else has any right to complain of that.

Under the above holdings, the skating rink floor and the other equipment in controversy, including the advertising signs are trade fixtures, and under the sixth clause of the lease, the statute and the holdings in the cited cases, they belong to appellant, with the right to remove them from the leased premises.

It is unnecessary to discuss any procedural questions raised by the parties. The record is sufficient for our holdings without considering such points. The decree of the circuit court is reversed and the cause is remanded with directions to enter a decree in conformity with the views herein expressed.

Reversed and remanded with directions.

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penings left when the building was built; a boiler enclosed in a
tick jacket; an engine, shafting, pulleys and wheels. (Boyer v.
Columbia, supra.)

Appellee urges that because the rink floor was especially con-
structed for use in the theatre and might be injured in its removal,
indicates it was intended to constitute a part of the real estate,
liking 26 C. J. sec. 15, c. 684 and Owing v. Water, 256 Ill. 553.
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here. The property removed was injured in the yard case, the Thoma
case, the Baker case and the Howard case, but the right to remove the
property was nevertheless upheld. In the Thoma case and in the Baker
case the court held that while the removal of the equipment would
cause some injury to it, that fact would not affect the right to re-
move it. That holding applies here. If anybody is injured by re-
moving the equipment it will be expropriation only, and no one else has any
right to complain of that.

Under the above holdings, the skating rink floor and the other
equipment in controversy, including the advertising signs are lease
holdings, and under the sixth clause of the lease, the absolute and the
right to remove them from the leased premises.

It is unnecessary to discuss any procedural questions raised by
the parties. The record is sufficient for our holdings without consid-
ering such points. The decree of the circuit court is reversed and the
cause is remanded with directions to enter a decree in conformity with
the views herein expressed.
Reversed and remanded with directions.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ot-

tawa, this 11th day of January,

in the year of our Lord one thousand nine hundred

and sixty -one.

Paul V. Wunder

Clerk of the Appellate Court.

42384

CUMMINGS-LANDAU LAUNDRY MACHINERY
COMPANY, a Corporation,

Appellee,

vs.

HARRY KOPLIN, et al.,

Appellants

316 I.A. 306²

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT OF

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse an order of the Superior court of Cook county entered June 15, 1942, denying its motion to dissolve a temporary injunction issued May 28, 1941, restraining defendants from "selling, dealing, installing, delivering, distributing," and from advertising or solicitation and delivery of any "Zephyr extractor, Zephyr washer, * * * or other Zephyr laundry machinery."

April 14, 1941, plaintiff filed its verified complaint against defendants alleging that on or about December 2, 1935, Murray Cohen, of New York City and the Zephyr Company, an Illinois corporation, with its principal place of business in Chicago, entered into a written agreement whereby Cohen agreed to purchase and the Zephyr Company agreed to sell certain patented and unpatented laundry machinery manufactured by the Zephyr Company; that Cohen should have the exclusive right to distribute machinery and equipment in New York, New Jersey, Pennsylvania, Maryland, Delaware, the District of Columbia and the New England States; that the contract had been assigned by Cohen to plaintiff, the Cummings-Landau Laundry Machinery Company, a corporation; that the parties entered upon the performance of the contract but defendants violated the agreement by selling laundry machinery and equipment in plaintiff's territory, as a result of which, plaintiff had been damaged \$20,000. The prayer was that defendants be enjoined and restrained from violating

CUNNINGHAM LAUNDRY MACHINERY
COMPANY, a Corporation,
Appellee,

vs.

HARRY ROPLIN, et al.,
Appellants

IN THE CIRCUIT COURT OF

THE FIRST JUDICIAL DISTRICT

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal defendants seek to reverse an order of the

superior court of Cook county entered June 18, 1941, denying its

motion to dissolve a temporary injunction issued May 18, 1941,

restaining defendants from "selling, dealing, installing, deliver-

ing, distributing," and from advertising or solicitation and deliv-

ery of any "Zephyr extractor, Zephyr washer, * * * or other

Zephyr laundry machinery."

April 14, 1941, plaintiff filed its verified complaint against

defendants alleging that on or about December 2, 1935, Harry Cohen,

of New York City and the Zephyr Company, an Illinois corporation,

with its principal place of business in Chicago, entered into a

written agreement whereby Cohen agreed to purchase and the Zephyr

Company agreed to sell certain patented and unpatented laundry

machinery manufactured by the Zephyr Company; that Cohen should have

the exclusive right to distribute machinery and equipment in the State

of New Jersey, Pennsylvania, Maryland, Delaware, the District of Columbia

and the New England States; that the contract had been assigned by

Cohen to plaintiff, the Cunningham Laundry Machinery Company,

a corporation; that the parties entered upon the performance of the

contract but defendants violated the agreement by selling laundry

machinery and equipment in plaintiff's territory, as a result

of which, plaintiff had been damaged \$50,000. The prayer was

that defendants be enjoined and restrained from violating

2.

the terms of the written agreement and for an accounting. The contract was attached to and made a part of the complaint.

May 12, 1941, some of the defendants answered denying that plaintiff had complied with the terms of the contract or that defendants had breached it, admitting they had made sales in the territory alleged to be plaintiff's but denying that such sales were in violation of the terms of the contract or while it was in existence.

May 28, 1941, the court entered the order sought to be revised which recites that the matter came on to be heard on motion of plaintiff's attorneys, for an injunction as **prayed** for in the verified complaint, " and the court having heard the argument for plaintiff and in opposition thereto, the argument for defendants, and having read the verified complaint and examined the exhibits attached thereto," and all parties being represented, the court found that equity had jurisdiction and that an injunction should issue. And it was adjudged and decreed that defendants be enjoined until the final determination of the cause, from selling, advertising or distributing machinery in plaintiff's territory, as above stated.

June 6, 1941, some of the **other** defendants filed their answer adopting the answer of defendants filed May 12. Nothing further appears in the record until nearly a year thereafter when, May 1, 1942, defendants filed an amendment to their answer deleting from the answer the allegation that the contract entered into between the parties was a contract for "an exclusive sales agent." And averred that the contract between the parties was void because it was in violation of section 1, of the Sherman Anti-Trust act, 15, U.S.C.A. and paragraphs 569 and 573, ch.38, Ill. Rev. Stats. 1941.

On the same day, defendants filed their verified petition to dissolve the temporary injunction, in which they set up a number of matters which need not be mentioned here, and also that

the terms of the written agreement and for an accounting. The complaint was attached to and made a part of the complaint.

May 12, 1941, some of the defendants answered denying that plaintiff had complied with the terms of the contract or that defendants had breached it, admitting they had made sales in the territory alleged to be plaintiff's but denying that such sales were in violation of the terms of the contract or while it was in existence. May 28, 1941, the court entered the order sought to be

revised which recites that the matter came on to be heard on motion of plaintiff's attorneys, for an injunction as prayed for in the verified complaint, "and the court having heard the argument for plaintiff and in opposition thereto, the argument for defendants, and having read the verified complaint and examined the exhibits attached thereto," and all parties being represented, the court found that equity had jurisdiction and that an injunction should issue. And it was adjudged and decreed that defendants be enjoined until the final determination of the cause, from selling, advertising or distributing machinery in plaintiff's territory, as above stated. June 8, 1941, some of the other defendants filed their answer

adopting the answer of defendants filed May 12. Moving further appears in the record until nearly a year thereafter when, May 1, 1942, defendant filed an amendment to their answer relating from the answer the allegation that the contract entered into between the parties was a contract for "an exclusive sales agent." And averred that the contract between the parties was void because it was in violation of section 1, of the Sherman Anti-Trust Act, 15 U.S.C. and paragraphs 559 and 575, ch. 38, 111, Rev. Stat. 1921.

On the same day, defendants filed their verified petition to dissolve the temporary injunction, in which they set up a number of matters which need not be mentioned here, and also that

3.

the contract was void because it provided that defendant, the Zephyr Company, which manufactured the laundry machinery, could and did fix the prices at which the machinery was to be resold by Cohen and his assignee, the plaintiff, contrary to the Federal and State Statutes, above mentioned.

May 7, 1942, plaintiff filed a reply to the answers and the amendment thereto and thereafter filed its answer to defendants' petition, setting up among other things, that the contract did not violate the Federal or State Statutes. Afterward, June 15, 1942, the court entered the order appealed from, which recited the matter came on to be heard on defendants' motion to dissolve the temporary injunction "heretofore entered in accordance with the prayer of a petition filed by the defendants and the answer thereto filed by the plaintiff, and the Court having heard both the argument of attorneys for plaintiff and defendants" the motion to dissolve the temporary injunction was denied.

Counsel for plaintiff say it is indispensable to an understanding of the present appeal that it be shown what occurred between May, 1941, when the injunction was issued, and June 15, 1942, when defendants' motion to dissolve the injunction was denied, and they say that during that period the court considered "voluminous testimony and exhibits" which do not appear in the record. That the court heard the testimony of the principal defendant, Harry Koplin; that June 6, 1941, the cause was referred to a master in chancery; that "Within that year, over 1250 pages of testimony and over 150 exhibits have been introduced before the Master and Chancellor."

This evidence is not in the record before us although a report of the proceedings on the trial is in the record. The only evidence shown is two exhibits - a letter dated December 3, 1941, from the Zephyr Company to plaintiff, and a letter dated June 2, 1942, from plaintiff to defendants.

The order awarding the injunction and the order denying defendants motion to dissolve the injunction, from which we have above quoted,

the contract was void because it provided that defendant, the Zephyr Company, which manufactured the laundry machinery, could not did fix the prices at which the machinery was to be sold by Cohen and his assigns, the plaintiff, contrary to the Federal and State Statutes, above mentioned.

May 7, 1942, plaintiff filed a reply to the answer and

the amendment thereto and plaintiff filed its answer to the defendants' petition, setting up among other things, that the contract did not violate the Federal or State Statutes. Afterward, June 18, 1942, the court entered the order specified above, which recited the matter came on to be heard on defendants' motion to dissolve the temporary injunction "heretofore entered in accordance with the prayer of a petition filed by the defendants and the answer thereto filed by the plaintiff, and the Court having heard both the argument of attorneys for plaintiff and defendants" the motion to dissolve the temporary injunction was denied.

Counsel for plaintiff say it is inadvisable to an

understanding of the present case that it be shown what occurred between May, 1941, when the injunction was issued, and June 18, 1942, when defendants' motion to dissolve the injunction was denied, and they say that during that time the court considered "voluntary testimony and exhibits" which do not appear in the record. But the court heard the testimony of the principal defendant, Henry Galt; that June 8, 1941, the cause was referred to a master in chancery; that "within that year, over 150 pages of testimony and over 150 exhibits have been introduced before the master and Chancellor."

This evidence is not in the record before us although a report

of the proceedings on the trial is in the record. The only

evidence shown is two exhibits - a letter dated December 8, 1941, from the Zephyr Company to plaintiff, and a letter dated June 1, 1942,

from plaintiff to defendants.

The order granting the injunction and the order denying defendants

4.

indicate that no evidence was considered by the court in issuing the injunction or in refusing to dissolve it. Obviously we must pass on the case as it appears from the record before us.

Defendants' position is (1) that since the contract provides that defendants, the manufacturers of the machinery, may fix the prices at which the purchaser is required to resell, the contract is illegal under section 1, of the Sherman Anti-Trust act, and that it is not rendered valid by the Miller-Tydings act which amended section 1. (2) That the temporary injunction should be dissolved because after it was issued, defendants terminated the contract, as they were authorized to do by the express terms of the contract; and (3) that they were not estopped to exercise their right to terminate the contract by anything they had done.

On the other side, plaintiff's position is (1) that the court properly refused to dissolve the injunction after he had considered the pleadings "and heard the testimony of the principal defendant," since the evidence and exhibits, taken into consideration by the chancellor are not before the court; (2) that defendants have, on numerous occasions, violated the injunction, as a result of which they have been held in contempt and a fine imposed; (3) that since defendants were guilty of breaching the contract and depriving plaintiff of the benefits it was entitled to under the contract, they cannot 8 months after the suit was filed, cancel the contract; that "The Sherman Anti-Trust Act prohibits combinations of trust or conspiracies in restraint of trade intended to control or eliminate competition. The fixing of list prices is only one of many elements to be taken into consideration * * * in determining whether a combination is in restraint of trade * * *. That act is not applicable to the fixing of a competitive list price by a manufacturer for his commodity in open competition with like commodities on the market, and not intended to stifle competition." (4) That the notice of cancellation given by plaintiff to defendants was insufficient.

Since we have reached the conclusion that the contract is in

indicate that no evidence was considered by the court in finding the injunction or in refusing to dissolve it. Obviously we must look on the case as it appears from the record before us.

Defendants' position is (1) that since the contract

provided that defendant, the manufacturer of the commodity, fix

the prices at which the purchaser is permitted to resell, the

contract is illegal under section 1 of the Sherman Anti-Trust

act, and that it is not rendered valid by the anti-trust act which

amended section 1. (2) That the contract is voidable

because it was made, defendant testified that

contract, as they were authorized to do by the express terms of the

contract; and (3) that they were not entitled to exercise their

right to terminate the contract by saying they had done.

On the other side, plaintiff's position is (1) that the court

properly refused to dissolve the injunction after he had considered

the findings "and heard the testimony of the principal defendant,"

since the evidence and exhibits, taken into consideration by the

chancellor are not before the court; (2) that defendant may, on

various occasions, violate the injunction, as a result of which

they have been held in contempt and a fine imposed; (3) that since

defendants were guilty of breaching the contract and violating plaintiff

of the benefits it was entitled to under the contract, the court

8 months after the suit was filed, granted the contract; that

the Sherman Anti-Trust Act prohibits combinations of trust or

conspiracies in restraint of trade intended to control or eliminate

competition. The fixing of list prices is only one of many elements

to be taken into consideration "in determining whether a

combination is in restraint of trade." That act is not

applicable to the fixing of a competitive list price by a manufacturer

for his commodity in open competition with like commodities on the

market, and not intended to stifle competition. (4) That the notice

of cancellation given by plaintiff to defendant was insufficient.

Since we have reached the conclusion that the contract is in

5.

violation of the Sherman Anti-Trust act and therefore illegal and void, this is the only contention made by defendants necessary for us to consider.

Section 1, of the Sherman Anti-Trust act of July 2, 1890 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:" and the section then provides for a penalty for the violation of that section.

In 1935 the Legislature of this State enacted the "Fair Trade Act" (ch. 121 1/2, par. 188, sec. 1, Ill. Rev. Stats. 1941) which provides that "Sec. 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such ~~stixx~~ producer or vendee." And by section 2 of that act it is made actionable to knowingly advertise for sale or sell any commodity at less than the price stipulated in the contract, pursuant to section 1, of the act.

Section 1, of the Sherman Anti-Trust act above quoted, was amended by an act of Congress August 17, 1937, by adding a provision: "That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing ^{minimum} prices for the resale

violation of the anti-trust act and therefore illegal and void, this is the only contention made by the defendant for us to consider.

Section 1, of the Sherman Anti-Trust Act of July 2, 1890 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal;" and the section then provides for a penalty for the violation of that section.

In 1935 the Legislature of this State amended the "Anti-Trade Act" (Ch. 121 1/2, Act. 1935, Sec. 1, III. Rev. Stat., 1935)

which provides that "Sec. 1. In contract relating to the sale or purchase of a commodity which bears, or has been or is to be, the trade mark, brand or name of the producer or owner of such commodity and which is in fact and upon competition with commodities of the same general class produced by others shall be deemed in violation of any law of this State if it is in violation of any of the following provisions which may be contained in such contract:

- "(1) That the buyer will not receive such commodity at the price stipulated by the vendor.
- "(2) That the producer or vendor will not sell to the buyer the sale of such commodity to another, that such purchaser shall not be able to sell, in turn, resell or otherwise dispose of the commodity at a price stipulated by the producer or vendor." and by section 2 of said act it is made actionable to knowingly advertise for sale or sell any commodity at less than the price stipulated in the contract, pursuant to section 1, of the act.

Section 1, of the Sherman Anti-Trust Act above quoted, was amended by an act of Congress August 17, 1890, by adding a provision that nothing contained in sections 1-3 of this title shall be deemed illegal, contracts or agreements prohibited by the same.

5.

of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with ^{same} commodities of the/general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State."

Counsel for plaintiff contend that by the contract in question, plaintiff is the exclusive sales' agent for defendants in the prescribed territory and therefore the contract is not invalidated by the Sherman Anti-Trust act, and in support of this the case of United States v. General Electric Co., 272 U. S. 476, and other authorities are cited. And further that: "The intent to control and maintain prices and stifle competition in restraint of trade by contract or otherwise, and not the fixing of list prices, is condemned by the Sherman Anti-Trust Act," citing United States v. Masonite Corp., 316 U. S. 265, and other cases.

Whether, under the terms of the contract, the title to the laundry machinery passed from defendants to plaintiff and the goods then resold by the latter in the specific territory, or whether plaintiff is the exclusive agent of the defendants in selling the goods, must be determined from an examination of the contract itself and not by any designation of it made by either party. Bendix v. Staver Carriage Co., 174 Ill. App.589. The controlling question is, will the carrying out of the contract tend to stifle competition by controlling and fixing prices.

The contract recites that the Zephyr Company is engaged in the manufacture of certain laundry and dry cleaning machines; that Cohen is engaged in selling various kinds of machines and that he is desirous of selling the laundry equipment manufactured by the Zephyr Company. It then provides: "this is a sales agreement for an exclusive territory; that the party of the first part [the Zephyr

of a commodity which bears, or the label or emblem of which bears,
the trade mark, brand, or name of the producer or the importer of
such commodity and which is in free and open competition with
commodities of the same class produced or distributed by others,
when contracts or agreements of this description are found to
be applied to interstate transactions, under any statute, law, or public
policy now or hereafter in effect in any State."

Counsel for plaintiff contend that by the words in question,
plaintiff is the exclusive seller, agent or distributor in the prescribed
territory and therefore the contract is not invalidated by the
Sherman Anti-Trust Act, and in support of this the case of United States
v. General Electric Co., 272 U. S. 475, and other authorities are
cited. And further that "the intent to control and restrict prices
and stifle competition in respect of goods by contract or otherwise,
and not the fixing of list prices, is condemned by the Sherman
Anti-Trust Act," citing United States v. American Paper Co., 210 U. S.
288, and other cases.

Further, under the terms of the contract, the right to the
laundry machinery goes and from defendant to plaintiff and the right
when resold by the latter in the exclusive territory, or otherwise,
plaintiff is the exclusive agent of the defendant in selling the
goods, must be determined from an examination of the contract itself
and not by any designation of it made by either party. United v.
Travelers Insurance Co., 174 Ill. 424, 425. The controlling question is
will the carrying out of the contract tend to stifle competition
by controlling and fixing prices.

The contract recites that the Japhyr Company is engaged in the
manufacture of certain laundry and dry cleaning machinery; that
it is engaged in selling various kinds of machines and that
it is desirous of selling the laundry equipment manufactured by the
Japhyr Company. It then provides: "This is a sales agreement for
the exclusive territory; that the right of the first party (the laundry

Company] agrees to sell, and the party of the second part [Cohen] agrees to buy," the laundry and dry cleaning machines and equipment from the Zephyr Company. That it is agreed that the contract is an Illinois contract "and all sales shall be considered made in the City of Chicago;" that all such machinery sold to Cohen for installation in the exclusive territory "shall be sold at the list price" of the Zephyr Company, "less the discounts hereinafter set forth." By the next paragraph it is provided that it shall be in force for a period of 3 years with an automatic renewal for the same number of years and a further renewal of 3 years, but during the third 3-year period either party may cancel the contract by giving certain notice to do so within not less than 120 days after the date of such notice; and the paragraph continues: "Each of the automatic renewals * * * is subject to the condition * * * that Cohen "buys a quota herein set forth in Paragraph Ninth over the three (3) years period immediately preceding the renewal period." Cohen was then given the sole and exclusive right to distribute the laundry machinery in the territory hereinbefore mentioned. By the 5th paragraph it was provided that the Zephyr Company "agrees to sell and deliver to" Cohen for which Cohen agrees to pay the prices fixed by the Zephyr Company at specified times by cash or a draft on a New York or Chicago bank; "the list price of machines less forty per cent (40%) discount, upon receipt of invoice; the party of the second part to be allowed a discount of forty per cent (40%) on all parts purchased from" the Zephyr Company, "invoices for parts to be billed two per cent (2%) for cash in ten (10) days, net cash thirty (30) days. Date of invoice is understood to be date of shipment."

That the Zephyr Company shall "fix and determine list price or prices at which its laundry and dry cleaning machines, * * * shall be sold to the retail customer, such prices, however, are not to be any higher than the prices at which * * *" the Zephyr Company

[Company] agree to sell, and the party of the second part (Cohen) agrees to buy, the laundry and dry cleaning machines and equipment from the Zephyr Company. That it is agreed that the contract is an Illinois contract and all sales shall be completed made in the City of Chicago; that all such machinery sold to Cohen for installation in the exclusive territory shall be sold at the list price of the Zephyr Company, less the discounts hereinafter set forth. If the next paragraph is provided that it shall be in force for a period of 3 years with an automatic renewal for the same number of years and a further renewal of 3 years, but during the third 3-year period either party may cancel the contract by giving certain notice to do so within not less than 180 days after the date of such notice; and the paragraph continues: "Each of the automatic renewals * * * is subject to the condition * * * that Cohen * * * buys a note herein set forth in Paragraph fifth over the three (3) years period immediately preceding the renewal period." Cohen was then given the sole and exclusive right to distribute the laundry machinery in the territory heretofore mentioned. By the 25th paragraph it was provided that the Zephyr Company "agrees to sell and deliver to" Cohen for which Cohen agrees to pay the prices fixed by the Zephyr Company at a specified time by cash or a draft on a New York or Chicago bank; "the list price of machines less forty per cent (\$40%) discount, upon receipt of invoice; the party of the second part to be allowed a discount of forty per cent (40%) on all parts purchased from the Zephyr Company, "invoices for parts to be billed two per cent (2%) for cash in ten (10) days, net cash thirty (30) days, date of invoice is understood to be date of shipment."

That the Zephyr Company shall fix and determine list prices or prices at which its laundry and dry cleaning machines, and parts shall be sold to the retail customer, such prices, however, and not to be any higher than the prices at which * * * the Zephyr Company

8.

"or any other manufacturer or distributor of similar machines, sells the same to any person, firm or corporation," and that no change in the retail selling price shall be made by the Zephyr Company except upon 60 days' notice in writing to Cohen. "The present listing prices are set forth upon a schedule hereto annexed and signed by both of the parties * * *, and these prices shall be the list prices until changed in accordance with the terms of this paragraph." The contract further provides that all laundry machinery and equipment manufactured by the Zephyr Company and shipped and delivered by it to Cohen "shall have placed on them, at a conspicuous place, a plate bearing the name and address of the manufacturer, which plate shall not be removed" by Cohen, nor shall he permit anyone to remove such plate so long as the machines remain in his possession. "All of said machines and equipment shall be advertised and sold as Zephyr-machines and equipment."

We think a contract, such as the one involved, under any construction of it, even if the machinery were sold by the Zephyr Company to Cohen or his assignee, the plaintiff, and the resale price fixed, would be valid by virtue of the provisions of the Miller-Tydings act, and the Fair Trade Act of this State. But the Miller-Tydings Act was passed in 1937, about 2 years after the contract in question was made, and there is nothing in the Miller-Tydings act that can in any way be said to validate or attempt to validate contracts made prior to the enactment of that act. Friedman v. City of Chicago, 374 Ill. 545, Rothschild v. Village of Calumet Park, 350 Ill. 330.

Upon a consideration of the contract, we are of opinion that it provides for the sale and purchase of the laundry machinery by Cohen or his assignee, the plaintiff, from the Zephyr Company

"or any other manufacturer or distributor of similar machines, while the same is in service, this is notwithstanding, and that no change in the retail selling price shall be made by the latter Company except upon 60 days' notice in writing to General. The

present listing prices are set forth upon a schedule hereto annexed and signed by both of the parties * * * and these prices shall be the list prices until changed in accordance with the terms of this paragraph. The contract further provides

that all machinery necessary and convenient connected by the latter Company and shipped and delivered by it to General shall have placed on them, at a conspicuous place, a plate bearing the

name and address of the manufacturer, which plate shall not be removed by General, nor shall he permit anyone to remove such plate so long as the machines remain in his possession. All of said machines and equipment shall be inventoried and sold as

typewriter-machines and equipment."

It being a contract, such as the one involved, under the construction of it, even if the machinery was sold by the latter

Company to General or his assignee, the plaintiff, and the resale

price fixed, would be valid by virtue of the provisions of the

Miller-Tydings act, and the Fair Trade Act of 1917, and the

Miller-Tydings act was passed in 1917, about a year after the

contract in question was made, and there is nothing in the

Miller-Tydings act that can be said to vitiate or affect

so valid a contract made prior to the enactment of said act.

Richman v. City of Chicago, 236 Ill. 444, 96 N.E. 1011, 1012.

DeLong v. DeLong, 236 Ill. 330.

Upon a consideration of the contract, we are of opinion

that it provides for the sale and purchase of the laundry equipment

by General or his assignee, the plaintiff, from the latter company

9.

and that it fixes the resale prices and is therefore contrary to the provisions of section 1, of the Sherman Anti-Trust act, and unenforceable. Boston Store of Chicago v. American Graphophone Co. 246 U. S. 8.

From what we have said it follows that defendants' motion to dissolve the temporary injunction should have been allowed. The order of the Superior court of Cook county, overruling the motion to dissolve the temporary injunction is reversed.

ORDER REVERSED.

Matchett, P.J., and McSurely, J., concur.

and that it fixes the resale price and is therefore contrary
to the provisions of section 1, of the anti-trust act, and
unlawful. Eastern State of Chicago v. Chicago Telephone Co.
348 U. S. 81.

From what we have said it follows that it is not
to dissolve the temporary injunction should have been granted, the
order of the superior court of Cook county, reversing the motion
to dissolve the temporary injunction is reversed.

CHAS. W. WYATT.

Wichita, Kan., and vicinity, J. J. Conner.

42384

CUMMINGS-LANDAU LAUNDRY MACHINERY
CO., a Corporation,

Appellee,

v.

HARRY KOPLIN, et al.,

Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

316 I.A. 306

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

In a petition for a rehearing, counsel say: "It is filed because we earnestly believe that the Court is in error in deciding the merits of this litigation on a review of an interlocutory order denying an application for dissolution of a temporary injunction."

In passing on the injunctive order involved, we considered only the verified complaint and the answer. The only evidence which the record showed was before the court was of no moment. We held that the contract which was the basis of plaintiff's suit and which was attached to and made a part of the complaint was void and unenforceable for the reasons stated in the opinion. The question of the validity of this contract was argued by counsel for both parties and no suggestion was made that we had no right to pass upon the validity of the contract, until the point was made in the petition for rehearing. Counsel in their petition say: "Whether the contract is void cannot be determined from the face of the contract alone. This is a question of fact to be determined on final pleadings and the hearing of evidence." And in support of this counsel cite McDougall Co. v. Woods, 247 Ill. App. 170; Friedman v. Peckler, 255 Ill. App. 199, and other cases, in which it was held that the purpose of a temporary injunction is to preserve the matters in statu quo until the court has an opportunity to consider the cause upon its merits and that the merits of a cause

JOHN J. GAGAN, Plaintiff,
vs.
HARRY REBLIN, et al.,
Defendants.

v.

HARRY REBLIN, et al.,
Defendants.

3101 A. 866

MR. JUSTICE O'CONNOR delivered the opinion of the court.

In a petition for a rehearing, counsel say: "It is filed because we earnestly believe that the court is in error in deciding the merits of this litigation on a review of an interlocutory order denying an application for dissolution of temporary injunction."

In passing on the interlocutory order denying, we considered only the verified complaint and the answer. The only evidence which the record shows was before the court was at no moment. It is held that the contract which is the basis of plaintiff's suit and which was attached to and made a part of the complaint was void and unenforceable for the reasons stated in the opinion. The question of the validity of this contract was argued by counsel for both parties and no suggestion was made that we had no right to pass upon the validity of the contract, until the point was made in the petition for rehearing. Counsel in their petition say: "Whether the contract is void cannot be determined from the facts of the contract alone. This is a question of fact to be determined on final findings and the hearing of evidence." It is argued of this court in Johnson v. Johnson, 27 Ill. App. 170; Friedman v. Friedman, 253 Ill. App. 100, and other cases, in which it was held that the purpose of a temporary injunction is to preserve the status in litto quo until the court had an opportunity to consider the case upon the merits and that the effect of a cause

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will not be considered on an interlocutory appeal from a temporary injunction, a demurrer having been filed to the bill. Those cases were correctly decided on the facts before the court. But the contention that a temporary injunction in all cases is to preserve the status quo is erroneous when applied to a different set of facts. A preliminary injunction may be mandatory. Peoples Gas Light & Coke Co. v. Slattery, 287 Ill. App. 379; Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber and Imp. Co., 86 Fed. 528; Quinn v. The Fountain Inn, et al., 218 Ill. App. 260; Watson v. Smith, 180 Ill. App. 289.

Moreover, where it appears that a suit is based on the validity of a written contract, which is made a part of the complaint, and a preliminary preventive writ of injunction is awarded, the basis of which is the validity of the contract, obviously if the contract is void as against public policy the injunctional order will be reversed by this court on an interlocutory appeal.

But counsel for plaintiff say that in our opinion we held that if the contract were entered into after the passage of the Miller-Tydings Act and the Fair Trade Act, it would be valid and they say this can be shown by evidence on the hearing of the case on its merits. But they further say in the instant case "when appellee undertakes to exercise this right in the trial court it will be faced by the contention that the decision of this Court on this appeal from an interlocutory order has established the law of the case and that under the law of the case this contract is void, whatever the facts as to its renewal or the acts of the parties under it." We think this argument is unwarranted because it is obvious that when the case is heard on its merits, both parties will be permitted to put in competent evidence tending to show that the contract is valid or invalid.

The petition for rehearing is denied.

Matchett, P. J., and McSurely, J., concur.

REHEARING DENIED.

will not be considered on an interlocutory appeal from a temporary injunction, a demurrer having been filed to the bill.

Those cases were correctly decided on the facts before the court. But the contention that a temporary injunction in all cases

is to preserve the status quo is erroneous when applied to a different set of facts. A preliminary injunction may be mandatory.

People's Gas Light & Coke Co. v. City of St. Louis, 87 Ill. App. 375; Pokagona Paper-Tine Lumber Co. v. Kalamazoo River Lumber and Ldg. Co., 88 Fed. 828; Winn v. The Fountain Inn, et al., 218 Ill. App. 280; Atsagh v. Smith, 180 Ill. App. 282.

Moreover, where it appears that a suit is based on the

validity of a written contract, which is made a part of the complaint, and a preliminary prohibitive writ of injunction is awarded, the basis of which is the validity of the contract, obviously if the contract is void as against public policy the

injunctive order will be reversed by this court on an interlocutory appeal.

But counsel for plaintiff say that in our opinion we hold

that if the contract were entered into after the passage of the

Miller-Tydings Act and the Fair Trade Act, it would be valid

and they say this can be shown by evidence on the hearing of the

case on its merits. But they further say in the instant case

"when appellee undertakes to exercise this right in the trial

court it will be faced by the contention that the decision of

this Court on this appeal from an interlocutory order has

established the law of the case and that under the law of the

case this contract is void, whatever the facts as to its formation

or the acts of the parties under it." It is this argument is

unwarranted because it is obvious that when the case is heard on its merits, both parties will be permitted to put in competent evidence

tending to show that the contract is valid or invalid.

The petition for rehearing is denied.

42426

DREWRY'S LIMITED, U.S.A., INC.,
a corporation,

Appellee,

v.

DREWRY'S BEERS, INC., a corporation,
JOHN D. BERNOSKI, ANNE BERNOSKI
and HAROLD NIMZ,

Appellants.

316 I.A. 307

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT,

COOK COUNTY.

OPINION PER CURIAM:

This is an appeal from an order denying defendants' motion to vacate an interlocutory order which provided for the issuance of an injunction without notice and bond "for good cause shown" and for the appointment of a receiver without plaintiff's bond.

Plaintiff says failure to provide bond on application for the receiver, was an oversight; contends that defendants cannot be harmed thereby because plaintiff owns a majority of stock of defendant corporation; and asks this court, under Section 78 of the Civil Practice Act, to amend the order by providing for plaintiff's bond, and affirm the action of the trial court.

The order appointing the receiver without requiring plaintiff's bond and without a full hearing, after notice, justifying its excuse, violates section 54, Chapter 22, Ill. Rev. Stats., and an order appointing a receiver without notice is improvidently entered, unless the complaint shows an emergency, in which notice would unduly prejudice plaintiff's rights of endanger the property for which the receiver is sought. Simpson v. Adkins, 311 Ill. App. 543. Chapter 69 on Injunctions, section 3, requires notice unless waiver is proper on allegations of complaint and affidavit, and section 9 requires plaintiff's bond unless good cause is shown for waiving it. A finding of "good cause shown" is insufficient, unless good cause appears from

RENEW'S LIMITED U.S.A., INC.,
corporation,

Appellee,

v.

RENEW'S BROS., INC., a corporation,
D. B. BROWSKI, and
and HAROLD BINK,

Appellants.

OPINION PER CUIUS:

This is an appeal from an order denying defendant's motion to vacate an interlocutory order which provided for the advance of an injunction without notice and bond "for good cause shown" and for the appointment of a receiver without plaintiff's bond. Plaintiff says failure to provide bond on application for the receiver, was an oversight; contents of defendant's answer are correct; defendant thereby because plaintiff owns a majority of stock of defendant corporation; and here this court, under Section 75 of the Civil Practice Act, to award the order by providing for plaintiff's bond, and affirm the action of the trial court.

The order appointing the receiver without requiring plaintiff's bond and without a full hearing, after notice, violating its excuse, violates section 64, Chapter 22, Ill. Rev. Stat., and an order appointing a receiver without notice is providently entered; unless the complaint shows an emergency, in which notice would unduly prejudice plaintiff's rights of managing the property for which the receiver is sought. Upon April 21 Ill. App. 542. Chapter 22 on injunctions, section 75, requires no fee unless waiver is made on affidavits of defendant and plaintiff, and section 64 requires plaintiff's bond unless good cause is shown for waiving it. A finding of "good cause shown" is insufficient, unless good cause appears from

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the record. Wagner v. Okner, 306 Ill. App. 601. That finding here rests on the complaint which must allege sufficient facts justifying the finding and excusing notice and bond.

The complaint alleges that the individual defendants are president, vice-president and secretary of the defendant corporation; that plaintiff owns and possesses 349 of the 350 shares of stock; that the business of the defendant corporation is exclusive sale and distribution of plaintiff's beer; that defendant corporation is indebted to plaintiff in excess of \$39,000.00 and is unable to pay the indebtedness; that plaintiff owns the motor trucks operated by the defendant corporation and has a chattel mortgage on the fixtures and equipment of the corporation; that the defendant corporation is insolvent and its officers refuse to execute settlement papers prepared pursuant to agreement to settle plaintiff's claims and that the officers threaten to collect outstanding accounts receivable and withdraw money of the defendant corporation; that an individual defendant drew and cashed a check drawn on corporate funds payable to cash; that defendant corporation has inventory sufficient for only a few days and plaintiff can no longer ship to defendant because of the state of its account and that it will thereby lose customers and it and its stockholders and creditors suffer irreparable damage. Plaintiff on information and belief charges the individual defendants have used and will use corporate defendant's money and accounts receivable, for purposes other than corporate to plaintiff's detriment; that plaintiff has no legal remedy and unless individual defendants are restrained from collecting accounts receivable or selling inventory or assets of the corporate defendant, or from withdrawing money of the corporation, the corporate affairs of defendant corporation will be wrecked to the damage of the plaintiff as stockholder and creditor; and alleges a receiver should be appointed to keep the business of defendant in regular and normal operation until disposition of the cause.

the finding and examining officer and board.

the complaint alleges that the individual defendants are
present, vice-presidents and members of the defendant corporation;
that plaintiff owns and possesses one of the 100 shares of stock;
that the interest of the defendant corporation in plaintiff's
and distribution of plaintiff's stock; that defendant corporation is
indebted to plaintiff in excess of \$20,000.00 and is unable to
pay the indebtedness; that plaintiff owns the stock of the corporation
by the defendant corporation and has a vested interest in the
profits and earnings of the corporation; that the defendant
corporation is insolvent and its affairs are being conducted in an
unfair and dishonest manner to the detriment of plaintiff's
rights and that the officers and directors of the defendant corporation
are guilty of fraud and misfeasance in the management of the corporation;
that an individual defendant has and holds a check upon the
defendant corporation for \$20,000.00; that defendant corporation has
received sufficient stock only a few days and plaintiff has no longer
any interest in the stock of the corporation and that it
will thereby lose interest and its stockholders and
creditors will suffer financial damage; plaintiff an individual and
also charges the individual defendant with the willful
conversion of plaintiff's money and property; that plaintiff
has suffered financial loss and damage; that plaintiff has
other than corporate in plaintiff's interest; that plaintiff has
no legal remedy and other individual defendants are responsible
for causing plaintiff's financial loss and damage; plaintiff an individual
of the defendant defendant, or from plaintiff's money of the corporation;
that, the defendant's interest in defendant corporation will be
vested in the hands of the plaintiff as shareholder and creditor;
and alleges a hearing should be conducted by the court to determine if the
defendant is guilty of fraud and misfeasance in the management of the

In the affidavit plaintiff's attorney affirms that he has knowledge of the facts alleged and that they are true in substance and in fact, except those on information and belief, which he verily believes to be true.

Plaintiff does not allege that by its ownership of the majority stock, it can not correct the matters complained of within the corporation without calling upon a court of equity; and does not say why defendant corporation is unable to pay its account with plaintiff. Its allegation of insolvency is a conclusion; it does not allege that individual defendants did not have the right to refuse to execute the papers; nor does it sufficiently charge why the outstanding accounts receivable should not be collected nor corporate money withdrawn; nor that drawing of and cashing the check was not proper; nor is it shown why defendant corporation should lose any customers. The allegation on information and belief is insufficient for it does not indicate for what purposes, other than corporate, money, merchandise and accounts receivable were or are intended to be used. The affidavit accompanying the complaint does not add to its sufficiency. It is evident that good cause was not shown for excusing notice of, and plaintiff's bond for, the appointment of a receiver.

For the foregoing reasons we are of the opinion that the order improvidently issued; Section 78 Civil Practice Act cannot apply to make it valid; and the order denying defendants' petition to vacate the order of June 27, 1942, is hereby reversed.

ORDER REVERSED.

In the affidavit Plaintiff's attorney claims that he has knowledge of the facts alleged and that they are true in substance and in fact, except those on information and belief, which he truly believes to be true.

Plaintiff does not allege that by its ownership of the forty stock, it can not correct the matters complained of within a corporation without calling upon a court of equity; and does not say any defendant corporation is unable to pay its account to Plaintiff. Its allegation of insolvency is a conclusion; it does not allege that individual defendant did not have the right to refuse to execute the papers; nor does it sufficiently charge that the outstanding accounts receivable should not be collected or corporate money withdrawn; nor that drawing of such checks was not proper; nor is it shown why defendant corporation could lose any customers. The allegation on information and belief is insufficient for it does not indicate for what purpose, other than corporate, money, merchandise and accounts receivable were intended to be used. The affidavit accompanying the complaint does not add to its sufficiency. It is evident that good cause is not shown for granting notice of, and Plaintiff's demand for, appointment of a receiver.

For the foregoing reasons we are of the opinion that the order is improvidently issued; Section 78 Civil Practice Act cannot be made valid; and the order denying defendant's petition to vacate the order of June 27, 1947, is hereby reversed.

ORDER REVERSED.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 9324

October

~~May~~ Term A. D. 1942

Agenda No. 2

Town of Pawnee, in Sangamon
County, Illinois,

Petitioner-Appellee

vs

Walter H. Hagler, William B.
Chittenden, James H. Reilly,
W. M. Rowe, Charles C. McBrien,
Carey E. Barnes and M. B.
Overaker, as Members of Board
of Auditors of the Town of
Capital, in Sangamon County,
Illinois.

Defendants-Appellants

316 I.A. 307

Appeal from
Circuit Court
Sangamon County.

RIESS, P. J.:

The Petitioner-Appellee, Town of Pawnee, Sangamon
County, Illinois, filed suit in the Circuit Court of said County
against members of the Board of Auditors of the Town of Capital
of said County, Defendants-Appellants herein, praying that a
peremptory Writ of Mandamus be ordered to issue out of said
Court commanding the Defendants-Appellants to audit and approve
for payment the claim of Petitioner-Appellee, based upon a final
judgment entered by a Police Magistrate's Court on October 15,
1940, from which judgment no appeal had been taken.

The mandamus suit was filed on June 13, 1941, and
after hearing thereof, the Court found the issues in favor of
the plaintiff and entered judgment for Petitioner-Appellee and
against Defendants-Appellants, granting the Writ as prayed for
in the petition. From that judgment, the Defendants-Appellants
have appealed to this Court.

TRACT

STATE OF ILLINOIS
COUNTY OF JEFFERSON
THIRD JUDICIAL DISTRICT

October

General No. 5344

Agenda No. 2

County of Jefferson, in Jefferson
County, Illinois,

Respondent-Appellee

vs

William H. Barker, William H.
Christensen, James H. Bailey,
J. E. Jones, Charles O. Johnson,
J. E. Barker and W. H.
Overman, as members of the
of Auditors of the Town of
Jefferson, in Jefferson County,
Illinois.

Defendant-Appellant

FILED, N. J.:

The Petitioner-Appellee, Town of Jefferson, Jefferson
County, Illinois, filed suit in the Circuit Court of said county
against members of the Board of Auditors of the Town of Jefferson
of said County, Defendants-Appellants herein, alleging that a
certiorari writ of Mandamus be granted to issue out of said
Court compelling the defendant-appellants to issue and receive
for payment the claim of petitioner-appellee, issued upon a claim
judgment entered by a police magistrate's Court on October 14,
1940, from which judgment no appeal had been taken.

The summons was filed on June 17, 1941, and
after hearing thereof, the Court found the issue in favor of
the plaintiff and entered judgment for petitioner-appellee and
against defendant-appellants, granting the writ as prayed for
in the petition. From said judgment, the defendant-appellants
have appealed to this Court.

The petition alleged the entry of the above judgment in the Police Magistrate's Court on October 15, 1941, for \$176.20 and for \$6.40 costs, and that no appeal was taken therefrom. It was further alleged that a certified copy of said proceedings including judgment entered therein was presented by the petitioner to the Board of Town Auditors of said town of Capital on May 7, 1941, with petitioner's attached affidavit that it was a just and correct claim or charge against said town; that the Board of Town Auditors has refused to audit and allow said judgment claim so that provision could be made for its payment. It was further alleged that the auditing of said judgment is a ministerial act not involving the exercise of official discretion, and that the refusal of said Board to audit and allow the same was arbitrary, unlawful and in violation of their legal duty to audit and allow the same as a claim against said town. Then follows petitioner's prayer for a Writ of Mandamus directed to the respective members of said Board commanding them to audit and approve the said claim for judgment and costs in favor of the Town of Pawnee, and to make a Certificate of their audit and the amount thereof to said Town of Capital and deliver the same to its Town Clerk as required by law.

Defendants-Appellants filed their answer denying that petitioner had obtained said judgment for said amount and costs, or for any amount, alleging that after trial of said cause, the Police Magistrate announced that he would give his opinion therein on the day following and that defendants are not advised and do not know when judgment was entered in said cause; that on October 25, 1940, one dollar (\$1.00) was tendered to and accepted by said Police Magistrate for a transcript of said proceedings, which was mailed on November 15, 1940; that defendants deny that a certified copy of the proceedings of the

the petition alleged the entry of the above judgment in the Police Magistrate's Court on October 12, 1941, for \$10.00 and for \$2.00 costs, and that in appeal the Police Magistrate. It was further alleged that a defaulting copy of said process being included in the record of the Court was returned by the petitioner to the Board of Town Auditors of said town of Capital on May 7, 1941, with petitioner's statement affirming that it was a just and correct claim on the part of said town; that the Board of Town Auditors has refused to audit and allow said judgment claim as said resolution would be made for the payment. It was further alleged that the audit of said judgment is a ministerial act not involving the exercise of official discretion, and that the refusal of said Board to audit and allow the same was arbitrary, unlawful and in violation of their legal duty to audit and allow the same as a claim against said town. Then follows petitioner's prayer for a writ of mandamus directed to the respective members of said Board commanding them to audit and approve the said claim for judgment and costs in favor of the town of Capital, and to make a certificate of their audit and the amount due to said town of Capital and deliver the same to the Town Clerk in accordance with law.

Before me, Notary Public for said town of Capital, the said petitioner and said town of Capital appeared and said judgment for said costs and costs, or for any amount, including said other claim of said town, the Police Magistrate announced that he would give his opinion thereon on the day following and that petitioner was not advised and do not know when judgment was entered. It was caused; that on October 25, 1940, the town of Capital was returned to and accepted by said Police Magistrate for a summary of said proceedings, which was mailed on November 10, 1940, and defendant deny that a certified copy of the proceedings of the

Police Magistrate's Court, including said judgment and costs were presented to the Auditors of the Town of Capital by petitioner or any person for him on May 7, or that petitioner's affidavit of correctness of said claim was attached, and states that in February 1940, there was presented to said Board of Auditors of Capital Township, a letter from the Police Magistrate, which in part set forth that on October 23, 1940, a judgment amounting to \$176.20 plus court costs of \$6.40 was entered against Capital Township in favor of Pawnee Township; that said letter was accompanied by what purported to be an affidavit and statement by the Supervisor of said Town of Pawnee, purporting to certify that Capital Township is indebted to said Pawnee Township for the amount of said judgment and costs; that again in May 1941 the same statement by said parties, purporting to be subscribed and sworn to, was again presented to the Board of Auditors of Capital Township. Defendants admit such auditing to be a ministerial act but deny that it does not involve official discretion. They deny that such refusal to audit and allow judgment in order that same may be paid was arbitrary, unlawful and in violation of their duty and say that said claim is unjust and that they are advised that such judgment is a nullity, and ask that they be dismissed with their costs. The answer is a denial of affirmative allegations of the complaint and created no new issues nor defense which required a reply by the plaintiff.

Appellants-Defendants assigned error,

(1) In holding that said claim was presented at the proper time;

(2) That said claim was presented in proper form;

(3) That said claim was properly presented;

(4) That judgment was a valid judgment;

(5) That the Order of the Court is contrary to law.

Police Department's Court, including said judgment and costs
were presented to the Board of Capital Township
petitioner in any manner for the purpose of the said petition
the affidavit of correctness of said claim was submitted
and where that in February 1940, there was presented to said
Board of Capital Township, a letter from the
Police Department, which in part set forth that on October
22, 1940, a judgment amounting to five hundred dollars
was entered against Capital Township in favor of
James Township; that said letter was accompanied by what
purported to be an affidavit and statement by the supervisor
of said town of township, purporting to certify that Capital
Township is indebted to said James Township for the amount
of said judgment and costs; that again in May 1941 the same
statement by said parties, purporting to be substantiated and
sworn to, was again presented to the Board of Capital Township
Capital Township. Petitioner's affidavit was submitted to the
Board and that day that it was not timely filed
disposition. They say that when referred to said Board
judgment in order that same may be said and substantiated, and
that it is a violation of their duty and not that said
claim is unjust and that they are advised that such judgment
is a nullity, and that they are advised that such judgment
The answer is a denial of all the allegations of the
plaint and created no new issues for defense which constituted
a reply by the plaintiff.

- Agreement-Settlement assigned away.
- (1) In holding that said claim was not valid of the
proper time;
- (2) That said claim was presented in proper time;
- (3) That said claim was properly presented;
- (4) That judgment was a valid judgment;
- (5) That the Board of Capital Township is authorized to pay

Appellee-Petitioner in its brief relies upon the following for affirmance of the Order of the Trial Court:

(1) That no Report of the Proceeding at the trial was filed and incorporated in the record filed in this Court, and since error assigned for reversal involved matters of evidence, this Court of review cannot consider the same and should dismiss the appeal or affirm the Order of the Trial Court.

(2) That in the absence of such Report of Proceedings at the trial, this Court is required to presume that the Trial Court had sufficient evidence before it to justify issuance for a Writ of Mandamus.

(3) That the errors assigned were not based upon issues made by the pleadings.

(4) That the auditing of a judgment against a town preceding provisions for payment, is a ministerial act not involving official discretion, the performance of which can be coerced by mandamus.

(5) That judgment by a Court having jurisdiction of the parties and subject matter cannot be collaterally attacked in a mandamus proceeding brought to enforce its payment, but its validity could only be questioned by direct appeal or petition for Writ of Certiorari, as provided by law.

Since no Report of Proceedings at the trial nor any Certificate of the Trial Judge in relation thereto was incorporated in the record, this Court is not in a position to review errors assigned which are based upon matters of evidence not so preserved and therefore not before this Court. Kilpatrick v. Schmitt 303 Ill. App. 15, 24 N. E. (2d) 224; People ex rel McDonough v. Sherwin, 361 Ill. 403, 198 N. E. 343; Hartford Accident & Indemnity Co. v. Federal Elec. Company 287 Ill. App. 616, 4 N. E. (2d) 805. In the absence of a Report

Appellate review is in the trial court where the
 following for affirmance of the order of the trial court:
 (1) That no report of the proceedings at the trial
 was filed and incorporated in the record filed in this Court,
 and since error assigned for reversal involved matters of
 evidence, this Court of review cannot consider the same and
 should dismiss the appeal on affirm the order of the trial
 Court.

(2) That in the absence of such report of proceed-
 ings at the trial, this Court is required to presume that
 the trial court had sufficient evidence before it to justify
 its decision for a bill of indictment.

(3) That the errors assigned were not based upon
 issues made by the pleadings.

(4) That the granting of a judgment entered a
 town proceeding provisions for payment, is a ministerial act
 not involving official discretion, the affirmance of which
 can be covered by certiorari.

(5) That judgment by a Court having jurisdiction
 of the parties and subject matter is conclusively
 attached in a ministerial proceeding brought to enforce its
 payment, but its validity could only be questioned by appeal
 or petition for writ of certiorari, as provided by law.

Since no report of proceedings at the trial was
 any certificate of the trial judge in relation thereto was
 incorporated in the record, this Court is not in a position
 to review errors assigned which are based upon matters of
 evidence and so affirmed and remanded and return with costs.

Kipparlo v. Kipparlo 303 Ill. App. 2d 421 (1977)
 People ex rel. Kipparlo v. Kipparlo, 303 Ill. App. 2d 421, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

of Proceedings at the trial, this Court is required to assume that the Trial Court had sufficient evidence before it to justify its Order. Kilpatrick v. Schmitt, supra.

It is the well settled law of this state that the auditing of a judgment against a town so that provisions may be made for its payment is a ministerial act and when in proper form involves no exercise of official discretion, and such auditing and approval may properly be coerced by mandamus proceedings. People ex. rel Baird & Warner v. Lindheimer, 370 Ill. 424, 19 N. E. (2d) 336; Town of Lyons v. Coolidge, 89 Ill. 529; People ex. rel Raymond v. Chicago & A. R. Co. 193 Ill. 364, 367 - 61 N. E. 1063; Purcell v. Town of Bear Creek, 138 Ill. 524, 530 -28 N. E. 1085. Judgments against towns are a town charge and when collected are to be paid to the persons to whom they shall have been adjudged. The Board of Town Auditors has no discretion to refuse to audit a valid judgment against a town. Moore v. Town of Browning, 373 Ill. 583; 27 N. E. (2d) 533.

In Town of Lyons v. Coolidge, et al, 89 Ill. 529, 535, it is aptly said "Mandamus is the proper remedy for enforcing the judgment against the town by compelling the board of auditors to audit and certify the amount necessary to satisfy the judgment, which is declared by the law to be a town charge, so that the same may be included in the amount of moneys to be levied on the taxable property in the town, and when collected, paid to the persons to whom it has been adjudged. The People ex. rel City of Cairo, 50 Ill. 155; City of Olney v. Harvey ibid. 454; Rogers v. The People ex rel 68 id. 154; Peoria Co. v. Gordon, 82 id 435."

It is alleged in the petition and admitted in the answer that a statement was filed with the Board of Town Auditors of the Town of Capital containing a recital concern-

of Proceedings at the trial, this Court is required to
assume that the Trial Court had sufficient evidence before
it to justify its order. *Ellis v. Ellis*, 100 Cal.
100. It is the well settled law of this state that the
setting of a judgment against a town or that provision
may be made for the payment in a stipulated sum and when
in proper form involves no question of official discretion,
and such setting and approval may properly be corrected by
judicial proceedings. *People ex rel. King & Brown v. King*
County, 250 Ill. 422, 13 N. E. (2d) 322; *Town of Lyons v.*
County, 250 Ill. 422; *People ex rel. Johnson v. County*, 2
N. E. 2d 123 Ill. 234, 235 - 236 N. E. 2d 123; *Town of Lyons*
of Cook County, 128 Ill. 234, 235 - 236 N. E. 2d 123. Judgment
against town and a town clerk and when collected and is to
paid to the persons to whom they shall have been assigned.
The Town of Lyons has no discretion to refuse to
make a valid judgment against a town. *People v. Town of*
Lyons, 250 Ill. 422; 25 N. E. 2d 123.
In *Town of Lyons v. County*, 250 Ill. 422,
250, it is held that judgment is the proper remedy for the
collection of judgments against the town by the setting of
judgment of *Lyons* to make and verify the same necessary
to satisfy the judgment, which is required by the law to be
a town clerk, so that the same may be included in the amount
of money to be levied on the taxable property in the town,
and when collected, paid to the persons to whom it has been
assigned. The people ex rel. King & Brown v. King County
City of Lyons v. County, 128 Ill. 234, 235 - 236 N. E. 2d 123.
The people ex rel. King & Brown v. County, 128 Ill. 234, 235 - 236 N. E. 2d 123.
It is alleged in the petition and verified in the
return that a judgment was filed with the Clerk of Town
Lyons on the 10th of October, 1924, containing a recital concerning

ing the judgment by the Police Magistrate accompanied by a purported affidavit of the Supervisor of the Town of Pawnee, certifying the amount and nature of the claim, during the month of February and again in the month of May, 1941, purporting to be subscribed and sworn to, was presented to the Board of Auditors of Capital Township. Neither the transcript nor form of the judgment before the Police Magistrate, which is alleged to be a nullity, nor the copies of the affidavit accompanying the claim filed with the Board of Town Auditors are preserved in the record and are therefore not before this Court. The mere contention here that the same is irregular and a nullity can have no force as against the affirmative finding and order of the Trial Court to the contrary.

While we have not fully discussed, we have carefully considered all assignments of error set forth in Defendants-Appellants brief and we find no reversible error in the record. The judgment of the Circuit Court of Sangamon County will therefore be affirmed.

JUDGMENT AFFIRMED.

and the judgment of the Police Magistrate recommended by a
subscribed affidavit at the expiration of the term of service,
overriding the amount and nature of the claim, having the
benefit of testimony and again in the month of May, 1901, the
claiming to be answered and served to, was answered to
the Board of Directors of Capital Township. Before the
expiration of the term of the judgment before the Police
Magistrate, which is alleged to be a nullity, was the notice
of the affidavit accompanying the claim filed with the Board
of Town Trustees who presented in the record and the State
Court not before this Court. The only evidence now that
the same is fraudulent and a nullity has been to show up
against the affirmative finding and award of the Board County
to the contrary.

While we have not fully discussed, we have care-

fully considered all arguments of error and there is
deliberate judgment that we find no reversible error
in the record. The judgment of the Board of Directors
County will therefore be affirmed.

JUDICIAL REVIEW.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 9346

October

~~May~~ Term A. D. 1942

Agenda No. 8

Mildred Sturgeon, Administra-
trix of the Estate of John E.
Sturgeon, Deceased,

Plaintiff-Appellee

vs

Clifton Quarton, a minor, by
Lester K. Vandever, his Guardian
ad Litem,

Defendant-Appellant

316 I.A. 308

Appeal from
Circuit Court of
Montgomery County

RIESS, P. J.:

Judgment was entered upon the verdict of a jury in an action at law in tort in the Circuit Court of Montgomery County, Illinois, on December 31, 1941, for the sum of \$5000.00 and costs of suit, in favor of the Plaintiff-Appellee, Mildred Sturgeon, Administratrix of the Estate of John E. Sturgeon, deceased, and against the Defendant-Appellant, Clifton Quarton, a minor, represented by Lester K. Vandever as his attorney and Guardian ad Litem. The suit was based on the alleged negligence of the defendant and arose out of an automobile collision between two cars respectively driven by defendant Quarton in an easterly direction and by plaintiff's intestate Sturgeon in a westerly direction along Federal Aid Route 38, a "black top" highway with unmarked center, at a point about one mile west of Litchfield, between 1:30 and 2 o'clock A. M. of August 4, 1940. The collision resulted in grave injuries to both drivers and in the subsequent death of plaintiff's intestate Sturgeon on September 2, 1940. Successive motions for a directed verdict for the defendant were interposed at the close of plaintiff's evidence and of all the evidence, followed by defendant's motions for judgment notwithstanding the verdict, and to set aside the verdict and grant a new trial,

STATE OF ILLINOIS
COURT OF COMMON PLEAS
JUDICIAL CIRCUIT

IN SENATE, JANUARY 1, 1924

SENATE NO. 2440

SENATE NO. 2440

SENATE NO. 2440

WILLIAM W. WATSON, Plaintiff,
vs.
JOHN J. WATSON, Defendant.

Plaintiff-Defendant

vs.

JOHN J. WATSON, Plaintiff,
vs.
WILLIAM W. WATSON, Defendant.

Plaintiff-Defendant

SENATE NO. 2440

WILLIAM W. WATSON was admitted to the practice of law in

the State of Illinois in 1912, and has since that time been

practicing law in the County of Cook, Illinois, and has since that time

been a resident of the City of Chicago, Illinois, and has since that time

been a member of the Illinois State Bar Association, and has since that time

been a member of the Cook County Bar Association, and has since that time

been a member of the Chicago Bar Association, and has since that time

been a member of the Illinois State Bar Association, and has since that time

been a member of the Cook County Bar Association, and has since that time

been a member of the Chicago Bar Association, and has since that time

been a member of the Illinois State Bar Association, and has since that time

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been a member of the Cook County Bar Association, and has since that time

been a member of the Chicago Bar Association, and has since that time

been a member of the Illinois State Bar Association, and has since that time

been a member of the Cook County Bar Association, and has since that time

all of which motions were denied by the Trial Court. From the above rulings and judgment, the defendant has perfected an appeal to this Court.

Before the trial, suit was dismissed as to Coy Quarton, father of Clifton Quarton, who had been joined as a co-defendant therein.

The complaint alleged that defendant negligently (a) failed to keep proper lookout for westbound traffic; (b) to maintain good and sufficient brakes on his car; (c) to give warning that he was about to turn his vehicle from a direct course, as required by Sec. 65, Ch. 95 $\frac{1}{2}$, Ill. Rev. Stats.; (d) drove same at excessive speed without proper regard to traffic and use of highway in violation of Sec. 49 of said Chapter; (e) failed to turn to right of center of highway while passing in violation of Sec. 55 of said Chapter; (f) drove to left of center of highway against plaintiff's intestate's automobile. Due care by plaintiff and plaintiff's intestate was also alleged. Defendant's answer denied all said allegations of negligence by him or of due care as alleged by plaintiff.

On appeal defendant assigns error by the Trial Court in overruling his various motions; in admitting incompetent evidence for plaintiff and excluding competent testimony offered by defendant and in giving or refusing certain instructions offered by the respective parties, and asks that the cause be reversed by the Court or reversed and remanded with directions.

As to the time and place of the collision, the location and condition of the wrecked cars and the subsequent physical condition of the parties, the witnesses were in substantial agreement. From the evidence, it appears that on August 4, 1940, between 1:30 and 2 o'clock A. M., defendant Clifton Quarton, aged 20 years, whose father was a farmer residing near Litchfield, Ill., was returning home alone from a dance at the "Coliseum"

all of which actions were taken by the Texas Board of
the above subject and his family, the following has been received

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the
6. sixth of these is the fact that the
7. seventh of these is the fact that the
8. eighth of these is the fact that the
9. ninth of these is the fact that the
10. tenth of these is the fact that the

[illegible][illegible]

or Tarro's Ballroom at Benld, where he had gone about 11:30 P.M.; that he was driving a 1936 Chevrolet sedan owned by his father, in an easterly direction over Federal Aid Route 38, a hard surfaced "black top" road, with unmarked center, known as the Litchfield-Gillespie road, at a point approximately one mile west of Litchfield; that the plaintiff's^s intestate, John E. Sturgeon, aged 35 years, a laborer, who resided with his wife and five year old child in Litchfield, was at that time and place driving his 1933 Oldsmobile Coupe along said highway in a westerly direction from Litchfield toward Gillespie, after leaving "Skinny's" restaurant and tavern where he had spent the earlier part of the night, when the collision occurred between the two cars going in opposite directions, wherein both the plaintiff's^s intestate and the defendant sustained serious injuries and plaintiff's^s intestate's death followed on September 2, 1940. The testimony further shows that the shock and injuries to both parties rendered them unconscious of and unable to recall what occurred at and immediately before the time of the collision and that no other person or persons occupied either car or were present at the time and place of the collision and resultant injuries. No marks of any kind made by the wheels or framework of either car were found on the "black top" which might otherwise have been circumstantial evidence of the respective locations of the two cars on the highway at the time of the collision. Scattered glass was found on both sides of the road and in front of both cars. The left front portions of both cars were badly mashed and twisted from apparently violent impacts clearly shown on five photographs admitted in evidence by consent of parties as showing their true condition. The wrecked cars were found at a distance 40 to 50 feet apart. The Sturgeon Oldsmobile Coupe was standing at the right or northerly side of the road and was facing westward in the direction in which it had been traveling, with two wheels in a shallow ditch and two on the

of Perry's Ballroom at Miami, where he had gone about 11:30 P.M.; that he was driving a 1935 Chevrolet sedan owned by his father, in an easterly direction over Federal Aid Route 38, a two-lane "black top" road, with unmarked center, known as the Littlefield-Gillespie road, at a point approximately one mile west of Littlefield; that the plaintiff, John E. Thompson, aged 35 years, a laborer, who resided with his wife and five year old child in Littlefield, was at that time and place driving the 1935 Chevrolet Coupe along said highway in a westerly direction from Littlefield toward Gillespie, after leaving "Johnny's" restaurant and tavern where he had spent the earlier part of the night, when the collision occurred between the two cars being in opposite directions, wherein both the plaintiff, John E. Thompson, and the defendant sustained serious injuries and the defendant's death followed on December 5, 1940. The testimony further shows that the shock and injuries to both parties rendered them unconscious of and unable to recall what occurred at and immediately before the time of the collision and that no other person or persons occupied either car or were present at the time and place of the collision and resultant injuries. No marks of any kind made by the wheels or framework of either car were found on the "black top", and no other evidence has been circumstantial evidence of the respective locations of the two cars on the highway at the time of the collision. Shattered glass was found on both sides of the road and in front of both cars. The left front portions of both cars were badly mangled and related from apparently violent impacts clearly shown on the photographs admitted in evidence by counsel of parties as showing their true condition. The wreckage cars were found at a distance of 50 to 60 feet apart. The Thompson Automobile Coupe was skidding to the right or northerly side of the road and was lying westward in the direction in which it had been traveling, and the wheels in a shallow ditch and two on the

edge of the "black top", with its left front wheel bent down. The Chevrolet driven by the defendant was found at the outer or right edge of the opposite or south side of the "black top" portion of the roadway in the direction in which the car had been traveling eastward and was lying upside down with the front end facing in a northeasterly direction. Some springs and parts of the cars and shattered glass were scattered on the highway between the two cars. On the following morning, a spot resembling blood was noted by one of the witnesses on the northerly side of the center of the highway.

The first person to arrive on the scene shortly after the occurrence was plaintiff's witness Herschell Donaldson, who resided in Litchfield where plaintiff intestate and defendant also resided. His testimony was uncontradicted and was corroborated by numerous witnesses as to conditions at the scene of the collision and was in substance as follows: That he had occasion to drive along the Litchfield-Gillespie road at about 1:30 o'clock on that morning; that he there came upon two cars - an Oldsmobile standing on the right or north side of road and facing west, and a Chevrolet lying upside down on the south side of the road, facing northeast. The cars were approximately 40 or 50 feet apart. The Chevrolet was almost in the ditch and the Oldsmobile had two wheels on the shoulder and the two left wheels on the "black top" road; "when I got there I got out of car and the fellow in the Oldsmobile Coupe (plaintiff's intestate) was standing up and holding his arm on his forehead. I asked if he was hurt but he didn't answer. I told him he better go and get in my car, and I would take him to the doctor or hospital. He didn't answer and I went to look in the other car to see if I could help whoever was in it, and when I got over there the ^{other} fellow (defendant) was lying in bottom of car. As I remember, the car was upside down. He was bleeding from nose and mouth and there was quite a pool of blood there.

side of the "black" car, with the left hand wheel facing
The Chevrolet driven by the defendant was found on the south
right side of the highway on the west side of the "black" car.
portion of the roadway in the direction in which the car was
been traveling westward and was lying on its side with the front
end facing in a westerly direction. The Chevrolet was partly
in the road and partially on the shoulder on the right
between the two cars. On the following morning, a road traveling
along was used up one of the wheels on the westerly side
of the center of the highway.
The first person to arrive on the scene shortly after
the occurrence was Plaintiff's witness, Kenneth [redacted], and
Plaintiff's witness, Plaintiff's witness and defendant
also arrived. His testimony was unimpeached and was corroborated
ed by numerous witnesses as to conditions at the scene of the
collision and was in substance as follows: That he had occasion
to drive along the Mitchell-Williams road at about 1:30 o'clock
on that morning; that he then went upon the scene - an automobile
standing on the right or north side of road and facing west, and
a Chevrolet lying upside down on the south side of the road, facing
westward. The cars were approximately 40 to 50 feet apart. The
Chevrolet was angled in the ditch and the automobile had two wheels
on the shoulder and the left wheel on the "black" car's road;
when I got there I got out of my car and the fellow in the "black" car
George (Plaintiff's witness) was standing up and looking at the car
on his forehead. I asked if he was hurt but he didn't answer. I
told him he better get out of my car, and I would take him to
the doctor or hospital. He didn't answer and I went to look at
the other car to see if I could help anybody who was in it, and when
I got over where the Williams (defendant) was lying in position he
out. As I remember, the car was upside down. He was bleeding
from nose and mouth and there was quite a pool of blood under.

I turned him over so he wouldn't strangle in his own blood, took him by shoulders and tried to pull him out of the car, because I thought he was the worse hurt of the two. I couldn't pull him out. His feet and legs were evidently caught under the cushion." Witness Donaldson then telephoned a call for the Carroll ambulance. He followed the ambulance back to the scene of the accident. He testified that he did not talk to Quarton at the car because "he was passed out, and didn't say a word;" that until he went to call the ambulance, his was the only car there other than the two involved in the collision. He stated "I didn't pay any particular attention as to where they struck; couldn't tell whether they struck on north or south side of road. I didn't look to see, one way or the other. There is no curve in the road. At that point there are several feet on each side from 'black top' to ditch, it is quite wide, not much of a ditch; would say from the 'black top' to the fence was 12 to 14 feet; quite wide on both shoulders. The road is level." Sturgeon spoke no words that witness could gather but just moaned and was mumbling someone's name but he didn't recall who.

Wayne Bandy, a State police officer, of Litchfield, testified that he was called to scene of accident about 2 o'clock in the morning, arriving about 2:15. He gave similar descriptions of locations of cars and of highway as other witnesses. He stated that there were no obstructions on highway which is level for at least a mile and parallels the Big Four Railroad, and that he couldn't tell where the two cars collided on the highway.

Clarence Estell of Litchfield, testified that he was in the used car and repair business and knew Sturgeon who had done work for him; that Sturgeon's 1933 Oldsmobile Coupe would go 35 miles an hour when driven on the afternoon before the accident.

James Ronan, a garage man of Litchfield, testified that he went out to scene of accident in early morning of August 4th,

I turned him over as he walked to his car and
took him by shoulders and tried to pull him out of the car, be-
cause I thought he was the worse hurt of the two. I couldn't
pull him out. His feet and legs were extremely badly hurt
the condition. Witness handled them before he called for the
Carroll ambulance. He followed the ambulance back to the scene
of the accident. He testified that he did not talk to anyone
at the car because he was scared out, and didn't say a word.
That until he went to call the ambulance, this was the only way
these other than the two involved in the collision. He added
"I didn't say any particular attention as to where they were;
couldn't tell whether they were on north or south side of road.
I didn't look to see, and was on the street. There is no curve
in the road. At that point there are several feet on each side
from where they were killed, it is quite wide, not much of a ditch;
would say from the yellow curb on the south side is 10 feet;
quite wide on both shoulders. The road is level." Johnson
again he says that witness could tell that they were on
heading someone's name but he didn't recall any.
Wayne Harty, a State Police officer, of Mansfield,
testified that he was called to scene of accident about 2 o'clock
in the morning, arriving about 2:15. He gave witness descrip-
tions of location of scene and of highway as other witnesses. He
stated that there were no obstructions on highway which is level
for at least a mile and paralleling the Big River Railroad, and that
he couldn't tell where the two cars collided on the highway.
Florence Estell of Mansfield, testified that he was in
the wood car and recalls Johnson and that Johnson was not alone
work for him; that Johnson's 1938 automobile license would be
35 miles an hour and driven in the afternoon before the accident.
James Harty, a garage man of Mansfield, testified that
he went out to scene of accident in early morning of August 1st,

where he "found two very badly wrecked automobiles." Substantially the same location and description of the cars and highway was given by him as by other witnesses. He testified that "there was quite a bit of glass on the road - glass and springs and parts of the cars, scattered from one to the other on highway for distance of 15 feet. There was quite a bit of glass in front of both cars, also glass on pavement between the cars. There is nothing else I can add as to condition of the road." On cross examination he stated that "glass was scattered from one car to the other, clear across the road and between the cars. I didn't look to see whether there was any marks by which I could tell where the cars collided, and didn't reach any decision as to that."

Harley Carroll of Litchfield, testified that he was the embalmer and funeral director; that about 1:30 in the morning of August 4th, he received and responded to a call for an ambulance to go out to the place of collision; that Sturgeon had already been taken to St. Francis Hospital in a private vehicle; that the occupant of the Chevrolet (defendant Quarton) was still in the car unconscious and one of the passers-by, who had stopped at the scene of accident had a flashlight and witness got inside car and found defendant Quarton, and described his condition. He further testified that "Leighton Brawley, my father and a fellow named Wolff were with me. Mr. Wolff rode to the hospital with me. In order to turn around, I had to pull out to get out of the debris of wreckage. I didn't want to get glass in my tires," and pulled up ahead of the Sturgeon car to turn around. The location of the cars were again described by him. Quarton's car was 3 or 4 car lengths east and 40 to 45 feet distant from the Sturgeon car, and was lying on its top facing in northeasterly direction on opposite side of the roadway. Witness testified, "I got down to figure out how to get him (Quarton) out of the car. He regained consciousness while I talked to him and he called me by name."

There is "found two very badly wrecked automobiles." "There is
initially the same location and description of the cars and highway
was given by him as by other witnesses. He testified that "there
was quite a bit of glass on the road - glass and broken and
parts of the car, scattered from one to the other on highway
far distance of it back. There was quite a bit of glass in front
of both cars, also glass on pavement between the cars. There is
nothing else I can add as to condition of the road." On cross
examination he stated that "glass was scattered from one car to
the other, of my across the road and between the cars. I didn't
look for any weather there was any water by which I could tell
where the cars collided, my mind's reach any decision as to that."
Verley, Correll of Lincoln, testified that he was the
operator and driver of the car; that about 1:30 in the morning of
August 2nd, he received and responded to a call for an ambulance
to go out to the place of collision; that the car and ambulance
was taken to St. Francis Hospital in a private vehicle; that the
account of the hospital (doctors' report) was still in the
my unconscious and one of the nurses-by, who had stopped at the
scene of accident had a flashlight and witness got into the car
and found defendant's car, and testified his condition. He
further testified that "Lester Verley, my father and a fellow
witness left with me. Mr. Verley took to the hospital with me.
In order to turn around, I had to pull out to get out of the debris
of wreckage. I didn't want to get glass in my eyes," and pulled
up ahead of the ambulance car to my front. The location of the
cars were again described by him. Verley's car was 7 or 8 car
lengths east and 40 to 45 feet distant from the ambulance car, and
was lying on its top facing in northwesterly direction in opposite
side of the roadway. Verley testified "I got down to Verley's
car to get him (Verley) out of the car. He regained consciousness
while I talked to him and he pulled me up."

That the witness later inquired of Quarton at the hospital as to how the accident occurred and he answered "Harley, I don't know. The last thing I remember is passing the outskirts of Hornsby." Hornsby is between 4 and 5 miles from scene of accident.

June Sandy, sister of Sturgeon, testified to the age, height and weight of Sturgeon; that he had been driving a car back as far as 1928; that she had ridden with him frequently; that he was a careful driver and observed all speed limits and traffic laws; that he never came home intoxicated and drank very little- a glass of beer now and then; that he had been in the army after 1932 for 5 years and had driven a school bus at Jefferson Barracks.

Mamie Large, and her husband, of Litchfield conducted "Skinny's Cafe" a restaurant and tavern on Route 66, and had known Sturgeon for about a year. Sturgeon came to their place of business about four or five times a week and was there on the evening or night of accident, with Mr. Dearduff, a contractor. He usually had sandwiches and coffee and stayed from one to four hours and talked to everybody. Witness Mamie Large testified that she got to the tavern at 1:30 A. M. of August 4th, -right after midnight and that Sturgeon was there and left immediately. He borrowed \$2.00 from her stating that he would buy gas and go to Gillespie. He had no intoxicating liquor there and she smelt none on his breath.

Witness A. T. Carroll corroborated the testimony of Harley Carroll as to both the conversation and condition of defendant Quarton.

Doctor Sihler, attending physician, of Litchfield testified to Sturgeon's injuries and cause of death that "I think the direct cause of Mr. Sturgeon's death was meningitis, caused by fracture of the skull; the portion fractured was the area above the eye and in frontal sinus; that connects directly with

That the witness later informed of question at the hospital
as to how the accident occurred and he answered "He fell",
don't know. The last thing I remember is passing the car
of Kennedy. Kennedy is between 4 and 5 miles from scene of
accident.

John Bondy, driver of Mustang, testified to the age,
height and weight of Kennedy; that he had seen driving a car
back as far as 1963; that he had ridden with him frequently;
that he was a careful driver and observed all speed limits
and traffic laws; that he never knew him intoxicated and from
very little - a glass of beer and lunch; that he had been in
the army after 1951 for 2 years and had driven a school bus at
Lafayette Park.

Walter Lange, and son, owner of Lafayette Park
"Lafayette's Cafe", a restaurant and tavern at Route 50, and had
known Kennedy for about a year. Stopped him to have a drink
of beer about four or five times a week and was there on
the evening of night of accident, with Mr. Bondy, a co-owner.
He usually had sandwiches and coffee and stayed from 10 to 12
hours and talked to everybody. Witness was large, built
that was got to the tavern at 1:30 a. m. of August 20, 1963.
After midnight and had Kennedy was there and left immediately.
He witnessed it. On that day stated that he would not go and go
to Chicago. He had no information from anyone and the next
noon on his trip.

Witness A. J. Carroll corroborated the testimony of
Walter Lange as to both the conversation and condition of de-

ceased driver, stating he was at Lafayette
testified to Kennedy's injuries and state of health and that
the direct cause of Mr. Kennedy's death was negligence, caused
by fracture of the skull; the police reported was the area
above the eye and in frontal area; that contact directly with

the covering of brain on the inside, and any infection you inhale, if there is break in sinus would be transmitted to lining of the brain and hence meningitis." This witness also described two broken rib, certain facial abrasions and further injuries to Sturgeon and treatment, first at hospital and later visits to office from home. As to defendant Quarton's injuries, witness stated that he was complaining of shock and in considerable pain when he saw him; that he had a broken leg, broken hip, broken pelvis, broken elbow and a general shocked condition; that he was in great pain. Did not recall as to head injuries and said he was not qualified to say he did or didn't have a concussion of the brain. He wasn't unconscious when seen at the hospital. Could not say exactly what time had elapsed after accident until he saw him.

Clifton Quarton, defendant, called for cross examination by plaintiff under Section 60 of Civil Practice Act, (Chap. 110 of Ill. Rev. Stats.), testified that he drove a 1936 Chevrolet Tudor Sedan on August 4th, 1940, over road known as Litchfield-Gillespie Road. It was his father's car, driven with the latter's permission. That he left Ballroom in Benld a quarter after one to one thirty; coming home through Gillespie and Hornsby, which is 4 or 5 miles from the scene where he was told that the accident occurred. That he made a statement to the coroner, "I don't know whether I was asleep or not at the time of this accident, I remember nothing of the accident." Witness states, "I would say the reason I don't remember whether I was asleep at the time of accident or not, was because I don't remember the accident. I don't remember it at all. I don't remember anything that happened from the time I left Hornsby or about Hornsby until I was in the hospital;" was in the Ballroom dancing- went alone - remember seeing Frank Nimmons there - was sober all evening - only intoxicating liquor of any kind or character he drank that evening was one bottle of beer - was alone in car while driving near Hornsby; was driving then

about 40 miles an hour - car was in perfect condition. Witness lived in Litchfield- was 20 years' old - arrived at Ballroom that night about 11:30.

For defendant, Frank Bernard Nimmons testified that he resided about six miles northwest of Litchfield with his father, and attends Gillespie High School; that he came along the Litchfield-Gillespie highway between 2 and 2:15 A. M., shortly after the collision; that he had been to what is known as Tarro's Ballroom with Russell Wolff. Saw wrecked cars. Sturgeon was hanging on the car door with his arm against his head; they tried to get him to sit down but he wouldn't stay there. Witness described location and condition of cars as stated by other witnesses. Was acquainted with Clifton Quarton for 2 or 3 years. He was lying in the other car, gasping for air, the seat was on top of him and his feet dangled under the dash; tried to talk to him, he was groaning and unconscious; was bleeding at the mouth and nose very bad; blood on the inside of the car and around his face and back of his head where he was lying. "We carried the seat off Quarton's body and my friend(Russell Wolff) got his feet out from under the dash and straightened him out; I undid his tie and straightened his collar so he could breathe. The ambulance came and took Quarton to St. Francis Hospital. Sturgeon was taken to the hospital by some other man. Quarton did not at any time while I was there or at the hospital, recall what had happened. I had seen Clifton Quarton that evening at the Colliseum Ballroom in Benld, 10 or 15 minutes before I left. When I talked to him he seemed perfectly natural and sober. I was in his company about 5 or 10 minutes that night." The other occupant of the car, Russell Wolff gave testimony similar to that of witness Nimmons. Witnesses Philip Brown and Franklin Orr testified in substance similar to the other witnesses as to condition and location of cars and roadway.

Doctor Talfer, of Hillsboro, testified that "It is very possible that one who is injured and receives a severe shock and a broken hip and a broken elbow and bruises about the mouth and face, on account of the shock does not recall the accident occurring

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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and also for some little time before the occurrence of the accident and some little time after that. In my own experience I have had cases in which that has happened." The injuries where this occurred were concussion. A head injury usually causes brain concussion, and can or will usually cause a loss of memory.

Coy Quarton, father, testified he lives 3 miles west of Litchfield, occupation, farmer. Father of Clifton Quarton; went to scene of accident about 9 o'clock the following morning and observed condition of the road; then there was nothing only glass over the road and what he believed to be blood on the north side of the road; no blood on the south side; it was in the car and the car had been moved. Glass was practically all over the road, no particular spot. It was on the "black top" and some off of the "black top". His son Clifton Quarton has driven an automobile since he was 13 or 14 years old and he has ridden with him quite often; when they go together Clifton usually does the driving. Question: " You may tell the jury what his habits are with reference to driving and what they were in 1940?" Mr. Godfrey: ^(Quarton) " I object to his habits of driving." Sustained. Witness then testified that Clifton drove to High School regularly for 4 years from the farm 3½ miles. In August 1940 " I had a Chevrolet automobile driven by my son that evening; it was a '36 model Tudor in number one shape. As far as I know the lights were all right; brakes should have been good, just had them relined."

The foregoing is the substance of what we deem to have been the material testimony. It is given more fully because we hold the determining issue and assignment of error before this Court to be whether or not as a matter of law, prima facie proof of the necessary elements constituting plaintiff's alleged cause of action is shown by the evidence, facts and circumstances in evidence and reasonable or legitimate inferences therefrom.

Concerning the motions interposed by the defendant for directed verdicts in his favor and for judgment notwithstanding the verdict which were denied by the Court, the applicable rule was set forth by this Court in the cases of Kane v. Wehner, 312 Ill. App. 391,

The following is the substance of what we found to have been
 an official testimony. It is given with this heading: "We
 are detaching from the evidence of other persons this report of
 a witness on the subject of the, being taken part of the
 necessary witness considered sufficient to show the nature of the
 shown by the evidence, facts and circumstances in evidence and
 responsible or important interests involved."
 Concerning the matter mentioned by the following law
 stated various in his form and for persons not mentioning
 the version which were given by the Court, the following was
 at times by the Court in the name of the Court, the following was

(399); 39 N. E. (2d) 51, and Gillett v. Williamsville State Bank, 310 Ill. App 395, 34 N. E. (2d) 552, and quoted with approval in the recent case of Dregne v. Five Cent Cab Company, 313 Ill. App. 539, as follows: "Upon a motion of the defendant for a directed verdict, the Court can only determine whether or not there was any evidence, which, with all reasonable inferences therefrom, viewed in the light most favorable to the plaintiff, tended to prove the material allegations of the complaint or some count thereof. If there was such evidence, it became the duty of the Trial Court to deny the defendant's motion for a directed verdict and to submit controverted issues of fact to the jury, subject only to the giving of proper written instructions by the Court as to the law applicable thereto. A motion to direct a verdict should be allowed if, when all the evidence is considered, with all reasonable inferences to be drawn therefrom in its aspect most favorable to the party against whom the motion is directed, there is a total failure to prove one or more necessary elements of the case." Ill. Central R. R. Co. v. Oswald, 338 Ill. 270; 170 N. E. 247. These principles, in varying language, have been frequently announced and applied under the particular facts and circumstances arising in numerous cases which have been reviewed by the Supreme and Appellate Courts of this State. The same rule is applicable in passing upon a motion for judgment notwithstanding the verdict as in motions for directed verdicts. Synwolt v. Klank, 296 Ill. App. 79; 15 N.E. (2d) 895; Larimore v. Larimore, 299 Ill. App. 547; 20 N. E. (2d) 902. In either case, if there is no evidence before the jury which, with reasonable or legitimate inferences therefrom, when viewed in the light most favorable to the plaintiff, tends to prove all of the necessary elements of the plaintiff's cause of action, the motion should be allowed by the Trial Court, and a failure to allow such motion becomes reversible error.

From the foregoing evidence, nothing appears as to how the collision actually happened; which car, if either, was on the

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wrong side or over the center line of the highway; what speed either car was traveling at or near the time of the accident; that either car was traveling at an excessive rate of speed, having regard to the traffic and use of the highway; whether either car had turned to the left in violation of any statutory provision or that the brakes on defendant's car were in any way defective, as charged in the complaint, is not affirmatively shown and does not appear from the evidence or reasonable inferences therefrom. The foregoing comprehend all express allegations of negligence. From the evidence, the manner in which and place in the highway where this collision actually occurred is left purely to conjecture.

Under the motions interposed, it became a question of law whether the record contains prima facie proof of the necessary elements of plaintiff's alleged cause of action (Ill. Central R.R. Co. v. Oswald, supra,) and we hold the record to be barren of such proof. While it is peculiarly the province of the jury to pass upon controverted questions of fact, their verdict cannot be based upon mere conjecture or speculation. The fact that either or both of the parties was injured or that one of the parties subsequently departed this life as a result of such injuries under the facts and circumstances appearing in the evidence, which is not conflicting, did not constitute prima facie proof of any negligence alleged in the complaint. Casey v. Chicago Rys. Co. 269 Ill. 386; 109 N.E. 984.

Plaintiff contended that the blood spot at some undesignated point north of the center of the highway, referred to by Coy Quarton as having been seen on the following day, was a circumstance tending to prove the place of the collision. This inference was not in accord with the evidence which showed that the Quarton car in which the defendant was found to be bleeding and unconscious, lay upside down at the south side of the road and was later turned back onto the highway and taken to town, and that Sturgeon, whose eye was cut and whose face and head were abraded and injured, was, according to all witnesses, the only person found out of his car and on the highway before Quarton was moved from his car to the ambulance which

wrong side or over the center line of the highway; that speed
either was traveling at or near the limit of law enforcement; that
either car was traveling at an excessive rate of speed, having re-
sulted in the traffic and use of the highway; whether either car
and turned to the left in violation of any statutory provision or
that the witness on defendant's car was in any way defective, as
concerned in the collision, is not sufficiently clear and does not
appear from the evidence to constitute sufficient testimony. The
forgetting component of witness' allegations of negligence. From
the evidence, the witness in witness was placed in the highway where
such collision actually occurred is left largely to conjecture.

Under the motion presented, it should be a question of
law whether the second collision after this event of the accident
elements of plaintiff's alleged cause of action (Ill. Central R.R.
Co. v. O'Connell, supra), and we hold the record to be against of such
proof. While it is peculiarly the province of the jury to pass
upon controverted questions of fact, their verdict should be based
upon facts and evidence or probability. The fact that either or both
of the parties was injured or lost out of the collision necessarily
impacted this life as a result of such injury when the facts
and circumstances appearing in the evidence, which is not controverted,
did not constitute such facts lost out of any negligence alleged
in the complaint. O'Connell v. Chicago & N.W. Ry. Co., 100 Ill. 2d 101.

Plaintiff's contention that the above facts are undisputed
and point herein of the center of the highway, referred to by the
witness as having been seen on the following day, was a circumstantial
evidence to prove the place of the collision. This inference was not
in accord with the evidence which showed that the accident was in
which the defendant was found to be traveling and negligent, in
spite down at the south side of the road and was later found dead
near the highway and across the road, and that defendant, before the
was out and across road and dead were placed and killed, was neces-
sary to all witnesses, the only person found out of the car and on the

stood on the highway. A theory cannot be said to be established by circumstantial evidence unless the facts are of such a nature and so related as to make it the only conclusion that could be reasonably drawn. *Celner v. Prather* 301 Ill. App. 224 (p.227); 22 N. E. (2d) 397; *Kelley v. Public Service Co.* 300 Ill. App.354; 21 N. E. (2d) 43; *Coffin v. Chicago City Ry. Co.* 251 Ill App.169. The plaintiff's conclusion to the contrary could only be based upon conjecture and speculation. The same is equally true of counsel's contentions concerning the presence of glass strewn across the highway between and in front of both cars, and concerning the condition of the front wheel of the Oldsmobile.

We have carefully examined the abstract and the contentions of respective parties concerning the facts and circumstances in evidence and we are forced to adopt the conclusion and to hold herein that there is in this record no affirmative proof of any alleged negligence on the part of the defendant. Without such proof, the plaintiff has wholly failed to establish her prima facie cause of action and a verdict cannot stand.

The Court properly admitted testimony concerning the driving habits of the deceased, in the absence of an occurrence witness as to what actually happened. It is clear from the testimony and from any legitimate inferences therefrom, that neither the plaintiff intestate nor the defendant in this case were able to testify^{to} what took place at or immediately prior to the time of the collision and grave resultant injuries to both parties, and any conclusion to the contrary would be so at variance with the testimony as to be merely conjectural. Had this suit been filed by the defendant in the first instance or by counter-claim, no greater nor less reasons for recovery could have been properly urged by the defendant under the record herein than is now contended on behalf of the plaintiff for recovery by her. Although the proof of plaintiff intestate's driving habits were properly admitted and properly considered as bearing upon the question of his due care, such evidence did not to any extent tend to sustain or prove the

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plaintiff's contention that the defendant was guilty of negligence which proximately caused the collision, injuries and resultant damages claimed in this suit. (Casey v. Chicago Rys. Co. supra; Bezouskas v. Kruger, 298 Ill. App. 462; 19 N. E. (2d) 116. In the absence of such testimony, which it was the affirmative duty of the plaintiff to produce in order to sustain her cause of action it became the duty of the Trial Court to grant defendant's motion for a directed verdict or to grant defendant's subsequent motion for judgment notwithstanding the verdict, and failure so to do in the absence of such proof constituted reversible error.

Since we find and hold that there is no evidence in the record which, with legitimate inferences therefrom, tends to prove the necessary elements of the plaintiff's cause of action as alleged in the complaint, it becomes unnecessary to pass upon appellant's assignments of error concerning given or refused instructions, aside from those directing a verdict for the defendant, upon which we have ruled, or to pass upon the admissibility of certain evidence concerning which errors were assigned by the appellant. No cross-errors were assigned herein.

Finding reversible errors in the record as hereinabove indicated, the judgment of the lower Court will be reversed and the cause remanded, with directions to set aside the judgment against the defendant and the order overruling appellant's motion for judgment notwithstanding the verdict; to allow said motion and enter judgment notwithstanding the verdict in favor of the defendant in bar of suit and for costs.

REVERSED AND REMANDED WITH DIRECTIONS.

plaintiff's complaint that the defendant was guilty of negligence which proximately caused the collision, injuries and resultant damage claimed in this suit. (Casey v. Chicago & N.W. Ry. Co., 100 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

WITNESSES AND COUNSEL FOR PLAINTIFF.

Abstract

GEN. NO. 9339

316 I.A. 309¹

IN THE
APPELLATE COURT
OF THE
STATE OF ILLINOIS
THIRD DISTRICT

October Term, A.D. 1942

AG No. 3

THE AMERICAN HISTORICAL
COMPANY, INC.,
Plaintiff-Appellant,

-vs-

A. L. CLARK, Conservator
of the Estate of ELLA M.
RAINEY, an incompetent
person,
Defendant-Appellee.

Appeal from Circuit Court

Greene County

DADY J.

Plaintiff-Appellant, hereafter referred to as "claimant,"
filed its claim in the County Court against the Estate of Ella M.
Rainey, an incompetent person. Claimant appealed to the Circuit Court
from the judgment of the County Court, and this appeal is from the
judgment of the Circuit Court.

No question of the sufficiency of the pleadings is raised. The
claim was heard by the Circuit Court without a jury. Claimant intro-
duced evidence in support of its claim. Defendant offered no evidence,
counsel for defendant stating the estate had no evidence to offer.

On May 24, 1941, Ella M. Rainey was adjudged incompetent and
a conservator for her estate was appointed. It is not contended that
the claim is affected by any question as to such incompetency.

Claimant offered and there was admitted in evidence, without
objection, as Exhibits 1, 2 and 3, three written instruments, each
dated and executed by Mrs. Rainey on March 21, 1938. One of such
instruments was as follows:

1000

NOV. 10, 1943

3101.A.309

IN THE
DISTRICT COURT OF THE
SOUTHERN DISTRICT OF NEW YORK
JULY 10, 1943

October Term, A.D. 1943

Exhibit

EXHIBIT NO. 1
IN THE
CASE OF
THE PEOPLE OF THE STATE OF NEW YORK
VS.
JOHN J. CONNELLEY
Defendant

L. BRANT, District Attorney
of the County of New York
vs.
JOHN J. CONNELLEY
Defendant

JOHN J. CONNELLEY
Defendant

Plaintiff-applicant, wherein referred to as "plaintiff,"
of the State of New York, County of New York, City of New York,
vs.
JOHN J. CONNELLEY, Defendant, wherein referred to as "defendant,"
of the County of New York, City of New York, and the State of New York,
County of New York, City of New York.

No question of the competency of the witnesses is raised. The
in and about the defendant's home, and a party, defendant, before
at evidence in support of the State. Defendant's attempt to deny
ago for defendant, stating the State had no evidence to deny.
On July 10, 1943, the State was advised that defendant was
investigator for the State was advised. It is not intended that
State is advised by the State as to the defendant's
Defendant's effort to deny the State's evidence, and
Defendant, on July 10, 1943, the State was advised that
as the State is advised by the State on July 10, 1943, the State

Witnesses are as follows:

"In Consideration of their undertaking the publication entitled 'Encyclopedia of American Biography' and in furtherance thereof, I hereby authorize The American Historical Society, Inc., or assigns to reserve space and execute on steel, a portrait of Henry T. Rainey for which I agree to pay to them or their order the sum of Three Hundred and fifty dollars when engraving is completed and proof furnished. I also authorize them to print, copyright and insert the required number of impressions in said publication. I also agree to furnish the photograph within ten days from the date hereof. Volume not included in this contract."

Another of such instruments was in identical words and figures, except that the portrait was to be that of Mrs. Rainey and the price \$300.

The third instrument was addressed to claimant and stated that Mrs. Rainey agreed to take one volume of the publication and pay claimant therefor \$25.00 upon delivery at her residence.

The Circuit Court allowed claimant a recovery of \$25.00 based on the third instrument, and no complaint as to such allowance is made by either party.

The Circuit Court denied any allowance based on either of the other two instruments.

A witness for claimant testified he was Associate Editor of the publication in question, that he saw Mrs. Rainey sign said three instruments, and that his company engraved the portraits of Mr. and Mrs. Rainey. He was then shown two exhibits numbered 4 and 5 respectively which were later admitted in evidence. He testified that Exhibit 4 was a steel engraving of Mrs. Rainey, and Exhibit 5 a steel engraving of Mr. Rainey, and that he submitted such exhibits to Mrs. Rainey on April 27, 1939, and secured her approval of the same. At the foot of each exhibit was written in

The Committee of the House of Representatives
has received information that the
Government is planning to
investigate the activities of
certain individuals in the
United States who are
alleged to be engaged in
unlawful activities in
connection with the
Government's foreign
policy. The Committee
is authorized to conduct
such investigation as it
deems necessary and
appropriate.

It is the policy of the Government to
maintain the highest standards of
conduct in the execution of its
functions.

The House of Representatives
has the honor to acknowledge
the receipt of your letter
of the 10th inst. and in
reply to inform you that
the same has been forwarded
to the proper authorities
for their consideration.

The House of Representatives
is authorized to conduct
such investigation as it
deems necessary and
appropriate.

The House of Representatives
has the honor to acknowledge
the receipt of your letter
of the 10th inst. and in
reply to inform you that
the same has been forwarded
to the proper authorities
for their consideration.

handwriting, "Approved 4/27/39," and immediately below this was the written signature "Ella M. Rainey." The witness testified he saw her write such signatures on April 27, 1939.

There was then introduced in evidence as Exhibit 6, a volume of the publication in question for the year 1940. The witness testified that the picture appearing on a certain page of such publication was the same picture and printed from the same plate as Exhibit 4, and that another picture appearing on another page was the same picture and printed from the same plate as Exhibit 5. He further testified that an engraved plate and the prints therefrom are both recognized as steel engravings and that an engraved plate is engraved by hand from a photograph.

All of the foregoing evidence was admitted without objection. All of such evidence was uncontradicted, and it was not in any way inherently improbable. Where the testimony is uncontradicted, either by positive testimony or circumstances, and is not inherently improbable, it cannot be rejected. (Kelly v. Jones, 290 Ill. 575.)

The judgment order of the trial court recites that such claim, except for the \$25.00, was disallowed for (1) "failure of proof to show the execution on steel of portraits of Ella M. and Henry T. Rainey," and (2) "failure to make delivery of two portraits on steel, etc. to Mrs. Rainey."

Neither Exhibit 1 nor Exhibit 2 contained any provision whatsoever requiring the delivery to Mrs. Rainey of any portrait on steel, and counsel for defendant does not make any such contention before this court.

No fault is found by defendant with the engravings identified as Exhibits 4 and 5.

1. The first of these is the "Moral Reform" movement, which is a movement for the improvement of the moral character of the individual. It is a movement for the improvement of the individual's character, and it is a movement for the improvement of the individual's character.

There are three instances in which the title is a title of the collection in question for the year 1900. The first is the title of the volume appearing in a certain year of the collection and the second is printed from the year 1900 as a title of the volume appearing in a certain year of the collection and the third is printed from the year 1900 as a title of the volume appearing in a certain year of the collection.

1. of such evidence was investigated, and it was not in any way
independently investigated. The two witnesses in question, being
positive testimony of circumstances, but it was independently
investigated, it seems to be stated. (See p. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835

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The only defense argued or relied on by defendant is that by the terms of each of said Exhibits 1 and 2 the claimant was required to execute (or engrave) a portrait on steel, and that there is no evidence proving or tending to prove such execution.

By the terms of each of such Exhibits 1 and 2 claimant agreed to publish the publication in question and in so doing to execute on steel a portrait of Mr. and Mrs. Rainey respectively, for the doing of which Mrs. Rainey agreed to pay claimant a certain sum, such payment to be made by her when the engraving was completed and proof thereof furnished to her.

In Webster's Collegiate Dictionary, "engraving" is defined as "The act or art of producing upon hard material incised or (by extension) raised patterns, characters, lines, etc., esp. on metal or wood," and "steel engraving" is defined as "Process of engraving on steel; also an impression from an engraved steel plate."

It is our opinion that the undisputed evidence affirmatively shows and we find that the steel engravings required by Exhibits 1 and 2 were duly made or caused to be made by the claimant. It is not denied that Exhibits 4 and 5 were steel engravings of Mrs. Rainey and Mr. Rainey respectively, furnished to her by the claimant, and that Mrs. Rainey on April 27, 1939, wrote on each of such exhibits her approval thereof. Being steel engravings, it necessarily follows that such engravings were made from engraved steel plates, and that such engraved steel plates were made or caused to be made by claimant.

It is our opinion and we find that ~~plaintiff~~^{claimant} fully complied with its part of the contract. The trial court therefore erred in not entering judgment for the ~~plaintiff~~^{claimant} for the full amount of the claim, to-wit, \$675.

The only person named or called on by reference is that by
the name of John W. Smith, and I the person who received
a letter (on envelope) I received by mail, and that letter is no
witness against me in any way.
By the name of John W. Smith, I am a witness against me
in the publication in question and in no other way.
I received a letter of the kind and nature mentioned, and that letter
I will not bring forward as my evidence, and I will
support it as well as I can with the evidence I have, and I will
support it as well as I can.

In the name of John W. Smith, I am a witness against me
in the name of John W. Smith, and I the person who received
a letter (on envelope) I received by mail, and that letter is no
witness against me in any way.
By the name of John W. Smith, I am a witness against me
in the publication in question and in no other way.
I received a letter of the kind and nature mentioned, and that letter
I will not bring forward as my evidence, and I will
support it as well as I can with the evidence I have, and I will
support it as well as I can.

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transcribed

The judgment of the circuit court is reversed without remanding, and judgment is entered here in favor of the claimant and against the estate of Ella W. Rainey, an incompetent person, for the sum of \$675. and costs of suit, to be paid in due course of administration.

Reversed and judgment here for \$675.

The subject of the report was in perfect health at the time of his death.

act

General Number 9345.

Agenda number 7.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

OCTOBER TERM, A.D. 1942

316 I.A. 309²

GEORGE GEISLER,

Plaintiff-Appellee,

-vs-

BANK OF BRUSSELS, a
Corporation,

Defendant-Appellant.

: APPEAL FROM THE CIRCUIT COURT

: OF CALHOUN COUNTY.

: ~~HONORABLE A. CLAY WILLIAMS,~~

: Judge Presiding.

HAYES, J.:

This is an appeal from the Circuit Court of Calhoun County where George Geisler, plaintiff, recovered a judgment against the Bank of Brussels in the sum of \$1,247.50, for fraud and deceit. The case was heard before the Court without a Jury.

The plaintiff filed his complaint on August 19, 1939 which alleged that on February 25, 1937 he conveyed 7½ acres of land to the defendant; that the defendant represented to him that his title was defective, by reason of an insufficient description; that it was necessary for him to deed the land to the defendant so the title could be quieted; that the Bank held a mortgage on said land for fifteen hundred dollars; that the defendant stated to him that it would deed the land back after the title was quieted, and that he, relying upon the said statements, executed the deed; that said statements were false, and that the Bank failed to reconvey but refused to do so, instead deeding it to a third person.

On September 3, 1941 the Court made a finding and entered a judgment in favor of the plaintiff and against the

2.

defendant in the sum of \$1,947.50, and on the same day the defendant made a motion to vacate said judgment. On October 11, 1941, the Court modified the judgment and reduced it to the sum of \$1247.50.

Plaintiff has assigned cross errors here on account of the reduction of judgment entered September 3, 1941 and points out that the motion asks merely for a vacation, and does not include a modification, further that the appeal was from the judgment of October 11, 1941 and that no appeal was taken from the judgment of September 3, 1941, and that the motion to vacate was not supported by an affidavit as required by the Civil Practice Act.

Section 83 of Chapter 77, Illinois Revised Statutes, 1941 provides: "Any such judgment, decree or order may hereafter be modified, set aside or vacated prior to the expiration of thirty days from the date of its rendition or in pursuance of a motion made within such thirty days, wherever, under the law heretofore in force, it might have been modified, set aside or vacated prior to the expiration of the term of court at which it was rendered or in pursuance of a motion made at that term." This statute was approved June 21, 1933 and under its provisions if the motion to vacate is made within the thirty days after the rendition of the judgment it is not necessary that the motion be verified or that there be an affidavit in support thereof. Plaintiff in support of their cross error contend that this statute is repealed by implication by the provisions for the vacation and setting aside of judgments contained in the Civil Practice Act, Chapter 110, section 174, paragraph 7, on account of the Civil Practice Act being approved two days later than the statute quoted above and entitled an Act in relation to final judgments. The section in the Civil Practice Act requires 'upon good cause shown by affidavit.'

3.

The question raised on the conflict of these two statutes is disposed of by the Supreme Court in the case of Frank v. Salomon, 376 Ill. 439, in which the Court stated: "Section 3 of 'An act in relation to final judgments, decrees and orders of courts of record in criminal and civil proceedings and the power to modify, vacate or set aside the same' (Ill. Rev. Stat. 1939, chap 77, par. 84) was enacted at the same session of the General Assembly as the Civil Practice act and they are in pari materia. * * * (and) are to be construed together. (People v. Wallace, 291 Ill. 465; People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co. 306 id. 459.) * * * The well-settled rule of statutory construction is that where there is found in a statute a particular enactment, it is held to be operative as against the general provisions on the subject either in the same act or in the general laws relating thereto. (Robbins v. Comrs. of Lincoln Park, 332 Ill. 571; Handtoffski v. Chicago Consolidated Traction Co. 274 id. 282.) Where, as here, the legislature reenacts a former statute, the effect of which has been judicially construed, it is presumed to have been reenacted in view of such construction. (People v. Illinois Central Railroad Co. 337 Ill. 278; Spiehs v. Insull, 278 id. 184.)"

Applying these principles to the act in relation to final judgments, chapter 77, section 83 will control. It has long been the established law that the Court during the term in which a judgment was entered could amend it or vacate it during the term. Unbehahn v. Fader, 319 Ill. 250. The amendment to the statute made in 1933 simply limited the time to thirty days after the entry of a judgment rather than during the term. The cross errors assigned are not well taken.

The evidence shows that the plaintiff was a man of limited business experience, who moved on the tract of land in question in 1920 and continued to live there until February 25,

The following table is a list of the names of the persons who have been appointed to the various offices of the State of New York, for the year 1890. The names are given in alphabetical order, and the offices are given in the order in which they are held.

Question: I know you discussed on this issue several times. I
killed business records, the record on the date of 1960 is
the evidence shows that the possibility was a man of

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1937,--living by fishing and farming the land. He gave a mortgage to the Bank to secure fifteen hundred dollars in 1932. His wife died in 1936 after which his health failed, and he shortly thereafter became involved financially. He saw the Bank officials a number of times early in 1937 and advised them that he would have to sell the farm to clean up. After that the cashier of the Bank, Mr. Zigrang, called on him and stated that the description of the land was defective and that it would be necessary for him to deed the property to them so they could quiet the title, and that the Bank would deed it back to him, after this was done. He accepted their proposition and conveyed the title to them. Nothing in the record discloses that the Bank brought any proceedings to quiet the title or correct it. Shortly after obtaining title, the Bank entered into negotiations with a man by the name of Dustheimer for the sale of the property, without any authority from the plaintiff and without his knowledge. During the time of these negotiations the plaintiff brought a man by the name of Steffens to the Bank to have a contract drawn for the sale of the land at a price of thirty five hundred dollars. A contract was written signed by Steffens and the plaintiff, and a deposit of one hundred dollars was paid down. This contract was witnessed by Zigrang, cashier of the Bank. This all occurred on April 1, 1937. On April 14, 1937 Steffens and the plaintiff went back to the Bank to pay off the mortgage. They were told by the officials of the Bank that the mortgage had been sold but they would get it back, and to come back later.

It appears the Bank made an agreement to sell the property to Dustheimer. On the 17th of June, Dustheimer and Steffens called at the Bank and asked for a deed to the property. The president of the Bank refused to do any business with them but referred them to the lawyer for the Bank, and they went to the lawyer's office.

5.

A deed was made conveying the property to Dustheimer and from Dustheimer to Steffens. This was all done without the knowledge of the plaintiff. A few days after the Bank transferred the property, the plaintiff went to the Bank and in anger stated that he didn't know they were going to deed the property, as he had a chance to sell it and have some money over the mortgage. Zigrang, who had been cashier of the bank for thirty years, but who at the time of the trial was not an officer of the Bank but a stockholder, testified in behalf of the plaintiff and corroborated him in all material respects. Dustheimer and Steffens were not called as witnesses by either side. The only official of the Bank to testify was Mr. Benken, the president, and he failed to contradict the plaintiff's evidence except that he stated he did not personally authorize anyone to make an agreement to deed the property back to Geisler, or as far as he could recall that the Board of Directors did not give this authorization.

The clear weight of the evidence under the record on all material points is with the plaintiff. The defendant contends that even though there was fraud and misrepresentation, Geisler is estopped to base an action on it because of his failure to act promptly after the same came to his knowledge. About two years expired from the time Geisler had knowledge of the fraud until he filed his suit. The general rule is that a person who has suffered from fraud and deceit, upon obtaining full knowledge of it must act promptly. It appears, however, that for several months after the conveyance Steffens, the purchaser, permitted Geisler to stay in possession. It further appears that at the time Geisler conveyed to the Bank, they told him to go ahead and sell the land and clean up his debts. Although it appears that in June, 1938 Geisler obtained

6.

knowledge that the Bank had conveyed the land, it does not appear that the Bank, Steffens or Dustheimer were not going to account to him for the difference between the purchase price of the land and the mortgage liens thereon. It also appears that Steffens gave Geisler seven hundred dollars to pay off the second mortgage, which was held by the estate of Geisler's father, who was deceased. It does not appear that Geisler had full knowledge of all the material elements of the transaction in June, 1937.

The circumstances and incidents surrounding the transaction were such that Geisler was lulled to sleep for a considerable space of time after the conveyance. These circumstances together with the facts, that Geisler was a man of limited business experience as well as intellectual capacity; that he had dealt with this bank for many years; that he had confidence in its officers and went to them with all his business transactions, and Geisler did not at any time after the conveyance by the Bank expressly affirm the transaction, in our judgment is reasonable excuse for the delay in bringing the suit. ~~Defendant (United States Engineer) Defendant~~

~~the Bank to pay the mortgage on the land which was~~
~~in the hands of the Bank.~~

We feel that the Trial Court reached the correct conclusion and that substantial justice was done by the judgment entered here, and the same should be affirmed. For the reasons herein assigned judgment is hereby affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1942

Agenda No. 5

Term No. 42M6

LEVI DAVIS,

Plaintiff-Appellee,

vs.

CHAS. P. DAVIS, Doing
Business Under the
Fictitious Name and
Style of HANNIBAL-
QUINCY TRUCK LINE,

Defendant-Appellant

316 I.A. 310

Appeal from the

Circuit Court of

Madison County,
Illinois.

CULBERTSON, P. J.

This is an appeal from a judgment in the amount of \$3,000.00, entered in the Circuit Court of Madison County, in favor of Appellee LEVI DAVIS (hereinafter called plaintiff), and against Appellant, CHAS. P. DAVIS, doing business under the fictitious name and style of Hannibal-Quincy Truck Line (hereinafter called defendant).

The suit was brought by the plaintiff, against the defendant, to recover for personal injuries sustained on the 17th day of January, 1941, when he was struck, while standing on a sidewalk, by a truck belonging to the defendant, and which truck at the time of the accident was being driven and operated by Donald Young, an employee of the defendant. From the evidence it appears that this accident happened at the northwest corner of the intersection of Belle Street and Sixteenth Street, in the City of Alton, and that Belle Street runs north and south, and Sixteenth Street, east and west.

Plaintiff testified he had left his home, about a block from the place where the accident happened, and that he was on

Belle Street, on the sidewalk, and that when he walked up to the intersection of the two streets he looked south, i. e., he looked to his right, and that is the last he remembers until later that night when he was in the hospital. The seriousness of the injuries the plaintiff received are not challenged on this appeal, nor is it urged on this appeal that the verdict is excessive.

Donald Young testified that he was employed by the defendant herein, and that on the day of the accident he started from St. Louis, Missouri, at about 8:00 p.m., and was going to Quincy by way of Alton; that he was familiar with the route, having driven it five or six times, and that as he was passing through Alton, on Belle Street, after crossing Sixteenth Street, going north, there is a big hill. This witness testified it had been snowing and raining and was turning cold, and that after he crossed over Sixteenth Street to go north, and started on Belle Street, about halfway up the hill the street was cindered, and from there on, over the top, it was just ice. He further testified that after he left Sixteenth Street, he ran up the hill as far as it was cindered and could not go any farther, and that he then set the brakes on his truck, that the brakes would not hold and that the truck and trailer started to slide back. He further testified that he could not control the truck with the brakes on and that he put it in reverse and opened the door, and that he was guiding it back down the hill when he saw a street cutting out to his left, or to the south, and that he cut for that street, but the tractor slipped and the back of the trailer ran across the curb and struck the plaintiff herein. From the evidence it appears that there were four wheels on the tractor and two on the trailer. This witness testified that he saw the plaintiff herein and hollered, "Hey, look out!" From this witness' testimony it appears that he did not have chains on the wheels at the time of the accident, and that at the time plaintiff was struck the wheels on the truck were turning around, rolling backwards, and that the brakes were not on.

Peter M. F. Bonner, called as a witness for the plaintiff, testified that he saw the accident as he was operating his car on Sixteenth Street and had just made a boulevard stop at the Belle Street intersection; that he observed the truck backing down the hill with all the wheels rolling, and that he did not hear anyone say anything, nor did he hear a horn sounded; that he saw the truck when it jumped over an eight-inch curb and hit the plaintiff, who was then standing on the sidewalk. This witness testified that as the tractor and trailer backed down, "it looked like it was on the left side of the street, that it zigzagged." This witness further testified that the streets were not slick enough for him to use skid chains.

Defendant contends for reversal of the judgment in this case upon two grounds: (First) That the facts disclose that plaintiff's injuries were the result of an unavoidable accident, and not due to the negligence of the defendant; and (Second) That the Trial Court erred in giving an instruction for the plaintiff. A fair consideration of the evidence in connection with this case persuades us, and we so hold, that this case should not be reversed on the assignment of error hereinbefore first referred to, for the reason that an accident for which no liability exists is one which is the result of an unknown cause, or is the result of an unknown or unexpected event happening in such an unusual manner from a known cause that it could not be reasonably expected or fore^{se}en and that it was not the result of negligence (CORNWELL v. BLOOMINGTON BUSINESSMENS' ASSOCIATION, 163 Ill. App. 461).

An issue of fact was presented in this case that we believe, and hold, was very properly submitted to a jury for their determination as it is solely a question of fact for the jury to determine whether the injury was the result of an unavoidable accident, or negligence (LEVY v. CHICAGO CITY RYS. CO., 187 Ill. App. 64).

We have examined the instruction, the giving of which is

assigned as error in this case, and while the instruction is subject to the criticism leveled against it, the giving of the instruction has been held to be not reversible error (EDWARD v. HILL-THOMAS LIME & CEMENT CO., 378 Ill. 180).

There being no reversible error in this record and the judgment being amply supported by the evidence, said judgment is hereby, accordingly, affirmed.

Judgment affirmed.

Abstract

FILED

NOV 2 1942

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1942.

31 C.I.A. 310 2

Agenda No. 7.

Term No. 42M9

CHARLES H. THEIS,

Plaintiff-Appellant,

vs.

STOLZE LUMBER COMPANY,
a Corporation,

Defendant-Appellee.

Appeal from the

County Court of

Madison County.

CULBERTSON, P. J.

This is an appeal from the County Court of Madison County from a finding in favor of Defendant-Appellee, STOLZE LUMBER COMPANY, a corporation (hereinafter called defendant), and against the Plaintiff-Appellant, CHARLES H. THEIS (hereinafter called plaintiff).

This suit was first brought in a Justice-of-the-Peace Court, and the trial resulted in a judgment in plaintiff's favor for \$250.00. An appeal was taken to the County Court and the cause was tried before the County Judge, without a jury, and resulted in a finding in favor of the defendant. An appeal to this Court followed.

The evidence discloses that this is a suit in which plaintiff seeks to recover a real estate broker's commission of \$250.00 from the defendant, being 5% of the sale price of a parcel of real estate in Granite City, Illinois, sold by the defendant to one Lurton George. The evidence shows that the plaintiff is a licensed real estate broker in Granite City and had been in that business for twenty years last past. In September, 1939, plaintiff contends, in a conversation with an official of the Stelze Lumber Company of Granite City, that said official told him the defendant wanted to sell the property, the sale of which furnishes

the basis for the commission claimed by plaintiff in this case, and that after plaintiff had conferred with another official of the defendant Company, that they told him they would be glad to have him sell it if he could. Plaintiff testified the sale price of the property was fixed at \$6500.00, and he was authorized to show it to prospective purchasers. Plaintiff contends he interviewed several people with a view to interesting them in the property, and finally, one of his prospects, Lurton George, indicated that he was interested. Plaintiff testified he took Lurton George through the property, and after he had considered the matter, Lurton George informed plaintiff he would buy the property but would not pay more than \$5000.00 for it. This offer was submitted to the defendant Company and rejected by them and a counter-proposition of \$5500.00 was made by the Company, but Lurton George refused to offer more than \$5000.00 for the property. Plaintiff testified that the defendant Company at one time agreed that they would accept \$5000.00 net to them for the property, and that if the sale was made on that basis, plaintiff would have to get his commission from the purchaser.

It appears from the evidence that in the early part of 1941 the defendant advertised the property for sale in the Edwardsville and Granite City newspapers and the sale price was designated as being \$6000.00, and finally an ad was inserted in the paper stating the price to be \$5000.00. Plaintiff contends he called to see the defendant a week or two before the last advertisement was run and told Mr. Phillips that he had a buyer ready and willing to take the property at \$5000.00 and gave the name of Lurton George as his prospect. It appears from the evidence that the property was sold to Lurton George for \$5000.00. Plaintiff contends he is entitled to a commission of 5% on the sale, or \$250.00. Plaintiff contends on this appeal that defendant entered into a secret agreement with Lurton George for the sale of this property to avoid the payment of a commission to the plaintiff herein.

We are very mindful of the established law that should govern that state of facts, if true, but we fail to find anything in the record establishing that contention.

From the evidence produced in behalf of the defendant it appears that Mr. Robert M. Phillips, acting for the corporation, told the plaintiff that they would not tie themselves up with anyone on the sale of the property, and that if plaintiff sold the property it would have to be a cash transaction and handled entirely by him, and that defendant reserved the right to make any deal it saw fit. It further appears from the evidence produced on behalf of the defendant that when plaintiff came to Mr. Phillips and stated that he could sell the property for \$5000.00, that he was told that the only way they would accept such an offer would be for him to secure his commission over and above the \$5000.00 cash net to the defendant.

Lurton George, the purchaser of the property, testified that he was contacted by plaintiff, but that no deal was closed by plaintiff. There is also the evidence of Mr. Phillips that he had talked to Lurton George, the purchaser of the property, prior to the time plaintiff mentioned his name to Mr. Phillips as a prospective buyer of the property.

This case having been tried by the Court, without a jury, the finding of the Trial Court on the controverted facts is entitled to the same weight as the verdict of a jury (MOORE v. DAVID J. MOLLOY CO., 222 Ill. App. 295). The judgment of that Court, who saw the witnesses and heard them testify, is conclusive on all questions of fact, if not manifestly against the weight of the evidence (SHAPLEIGH HDW. CO. vs. ENTERPRISE FOUNDRY CO., 305 Ill. App. 180; MEYER vs. HENDRIX, 311 Ill. App. 605, 609).

A careful consideration of the evidence in this case brings us to the conclusion that the finding of the Court, in favor of the defendant in this case, is not against the manifest weight of the evidence, but that said finding has abundant support in the

evidence. The judgment of the Trial Court, being correct, the same is hereby affirmed.

Judgment affirmed.

Abstract

FILED

NOV 2 1942

David J. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



1-1-42

316 I.A. 441

41685

STANDARD ASBESTOS MANUFACTURING
COMPANY, a corporation,
Appellant,

v.

E. W. KAISER & A. G. KAISER,
copartners doing business as
E. B. KAISER COMPANY,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Lundoff-Bicknell Company was awarded the general contract for the erection of the Higbee Department Store building in Cleveland, Ohio. The general contractor awarded defendants herein, E. W. Kaiser and A. G. Kaiser, copartners, doing business as E. B. Kaiser Company, the contract for the plumbing and heating in said building. Defendants in turn engaged plaintiff, Standard Asbestos Manufacturing Company, to furnish and install the covering and insulation for the plumbing and heating pipes and fixtures.

The complaint alleged substantially that January 14, 1931 plaintiff entered into a written contract with defendants under the terms of which it agreed to furnish and install "all the covering and insulating for the Higbee Department Store at Cleveland, Ohio, "which defendants were obligated to furnish and install under their contract of November 12, 1930 between them and Lundoff-Bicknell Company, the general contractors; that the contract between plaintiff and defendants was subject to all the terms and conditions of the contract between the defendants and the general contractor; that the price specified in plaintiff's contract with defendants was \$14,700 "payable in such proportions and at such times as it is received by the said E. B. Kaiser from the said Lundoff-Bicknell Company;" that thereafter on April 21, 1931 plaintiff entered into an additional written contract with defendants whereby it agreed to furnish and install insulating

STANDARD ASBESTOS MANUFACTURING
COMPANY, a corporation,
Plaintiff,

v.

R. W. KAISER & A. G. KAISER,
copartners doing business as
R. B. KAISER COMPANY,
Appellees.

ATLANTIC CIRCUIT
COURT, COCK COUNTY

MR. PRESIDING JUSTICE MULLIN DELIVERED THE OPINION OF THE COURT.
Lundell-Bicknell Company was awarded the general contract
for the erection of the Hilde Department Store building in Cleve-
land, Ohio. The general contractor awarded defendants herein,
R. W. Kaiser and A. G. Kaiser, copartners, doing business as
R. B. Kaiser Company, the contract for the plumbing and heating
in said building. Defendants in turn engaged plaintiff, Standard
Asbestos Manufacturing Company, to furnish and install the cover-
ing and insulation for the plumbing and heating pipes and fixtures.
The complaint alleged substantially that January 14, 1931
plaintiff entered into a written contract with defendants under
the terms of which it agreed to furnish and install "all the
covering and insulating for the Hilde Department Store at Cleve-
land, Ohio," which defendants were obligated to furnish and install
under their contract of November 12, 1930 between them and Lundell-
Bicknell Company, the general contractors; that the contract
between plaintiff and defendants was subject to all the terms
and conditions of the contract between the defendants and the
general contractor; that the price specified in plaintiff's
contract with defendants was \$14,700 "payable in such proportions
and at such times as it is received by the said R. B. Kaiser from
the said Lundell-Bicknell Company;" that thereafter on April 21,
1931 plaintiff entered into an additional written contract with
defendants whereby it agreed to furnish and install insulating

materials for the drinking water supply pipe and the balancing tank in the aforesaid Higbee Department Store for the sum of \$1,000; that plaintiff performed the work covered by the aforesaid written contract and at the special instance and request of defendants performed extra work on said job; that payment "has been made to the defendant, E. B. Kaiser Company by the general contractor, Lundoff-Bicknell Company, in accordance with the said prices specified by the plaintiff;" and that there is a balance of \$7,250.34 with interest due plaintiff from defendants.

Defendants' answer denied that "the work and labor performed by plaintiff was approved by defendants or anyone else and alleged that a great deal of said work and labor was the subject matter of many controversies and disputes between the plaintiff, the defendants, the general contractor, the owner and the architect." Defendants' answer specifically denied "that payment had been made to them by the general contractor or anyone else" for the items with respect to which recovery was sought in the complaint. The answer also alleged that the extras in question were not furnished by the plaintiff at the special instance and request of defendants but at the special instance and request of the owner.

The cause was referred to a master in chancery to take proof and report his findings and conclusions relative thereto. The facts appear sufficiently from the report of the master which is set forth as follows in the abstract of record:

"That the plaintiff, in accordance with the terms and provisions of the contract *** between the defendants and the Lundoff-Bicknell Company, completed the work called for in the contract [between plaintiff and defendants] (plaintiff's Exhibit 'A') and performed the work in a workmanlike manner, all of which was duly approved by the defendants, by Lundoff-Bicknell Company and by the architects, and that there became due to the plaintiff by reason thereof the sum of \$14,700; that said amount is admitted by the defendants.

"The Master finds that while the work mentioned in said Exhibit 'A' was being done, the defendants ordered and directed the plaintiff to do certain extras and additional work; that

materials for the drinking water supply pipe and the following tank in the aforesaid Highes Department Store for the sum of \$1,000; that plaintiff performed the work covered by the aforesaid written contract and at the special instance and request of defendant performed extra work on said job; that payment "has been made to the defendant, E. B. Kaiser Company by the general contractor, Lundoff-Bicknell Company, in accordance with the said prices specified by the plaintiff;" and that there is a balance of \$7,350.34 with interest due plaintiff from defendants.

Defendants' answer denied that "the work and labor performed by plaintiff was approved by defendants or anyone else and alleged that a great deal of said work and labor was the subject matter of many controversies and disputes between the plaintiff, the defendants, the general contractor, the owner and the architect." Defendants' answer specifically denied "that payment had been made to them by the general contractor or anyone else" for the items with respect to which recovery was sought in the complaint. The answer also alleged that the extras in question were not furnished by the plaintiff at the special instance and request of defendants but at the special instance and request of the owner. The case was referred to a master in chancery to take proof and report his findings and conclusions relative thereto. The facts appear sufficiently from the report of the master which is set forth as follows in the abstract of record;

"That the plaintiff, in accordance with the terms and provisions of the contract *** between the defendant and the Lundoff-Bicknell Company, completed the work called for in the contract between plaintiff and defendant (plaintiff's Exhibit 'A') and performed the work in a workmanlike manner, all of which was duly approved by the defendants, by Lundoff-Bicknell Company and by the architect, and that there became due to the plaintiff by reason thereof the sum of \$11,700; that said amount is admitted by the defendants.

"The master finds that while the work mentioned in said Exhibit 'A' was being done, the defendants ordered and directed the plaintiff to do certain extra and additional work; that

the plaintiff performed said extra and additional work which was duly approved by the defendants and by the Lundoff-Bicknell Company.

"That the work was done in a workmanlike manner, and as a result of said extras and additional work, there became due and payable to the plaintiff the sum of \$4,871.29. The Master finds that this item is disputed by the defendants who contend, first; that this work was not ordered by them but was ordered by the owner, and second, that if the work was ordered by them, there is no satisfactory proof that the work and materials, which formed the basis of the claim for \$4,871.29 were furnished.

"That on the 21st day of April, 1931, the plaintiff entered into an additional contract with the defendants (plaintiff's Exhibit 'C') by the terms of which plaintiff agreed to furnish and supply certain insulating materials, etc., and to furnish and install the same under and by virtue of the said contract.***

"That the work was performed in a workmanlike manner and was duly approved by the defendants, et al., and there became due to the plaintiff the sum of \$1,000, and that the defendants admit this item.

"That while the plaintiff was doing the work under the said plaintiff's Exhibit 'C', the defendants directed plaintiff to do certain additional work; that this extra additional work was furnished and there became due and payable to plaintiff the sum of \$222.30, which item is likewise admitted by the defendants.

"That it was stipulated and agreed by and between the parties that the defendants are entitled to the following credits:

"Cash payment to the *** [plaintiff]	\$13,000.00
"Pro-rata back charges as admitted in	
Exhibit 'B'.....	456.00
"Direct back charges as admitted in	
Exhibit 'B'.....	87.25
"Total.....	\$13,543.25

"The Master finds that certain disputes had arisen between the defendants and the general contractor as to the amounts which the defendants claim they were entitled to under their contract with Lundoff-Bicknell Company, and negotiations were had between the parties; that the total amount due to the defendants under their contract was \$223,870.51, defendants received on account \$192,325.66, leaving a balance of \$31,544.85; that said item was paid to the defendants under a settlement whereby certain monies were deposited with the Guardian Trust Company of Cleveland, Ohio, under an escrow agreement dated the 8th day of December, 1932. ***

"After the filing of the suit herein, the plaintiff received from the Guardian Trust Company, on account of its claim, the sum of \$4,906.74, which plaintiff credited to the account of the defendants, and there is no contest as to this credit.

"The defendants did not receive the entire amount which they claim was due them and to their subcontractors. Specifically

the plaintiff performed said extra and additional work which was duly approved by the defendants and by the London-Bicknell Company.

"That the work was done in a workmanlike manner, and as a result of said extras and additional work, there became due and payable to the plaintiff the sum of \$4,871.29. The defendants admit that this item is disputed by the defendants who contend, first, that this work was not ordered by them but was ordered by the owner, and second, that if the work was ordered by them, there is no satisfactory proof that the work and materials, which forms the basis of the claim for \$4,871.29 were furnished.

"That on the 21st day of April, 1931, the plaintiff entered into an additional contract with the defendants (plaintiff's Exhibit 'C') by the terms of which plaintiff agreed to furnish and supply certain installing materials, etc., and to furnish and install the same under and by virtue of the said contract.

"That the work was performed in a workmanlike manner and was duly approved by the defendants, et al., and there became due and payable to the plaintiff the sum of \$1,000, and that the defendants admit this item.

"That while the plaintiff is doing the work under the said plaintiff's Exhibit 'C', the defendants directed plaintiff to do certain additional work; that this extra additional work was furnished and there became due and payable to plaintiff the sum of \$222.30, which item is likewise admitted by the defendants.

"That it is stipulated and agreed by and between the parties that the defendants are entitled to the following credits:

"Cash payment to the *** [plaintiff]	\$12,002.00
"Pro-rata back charges as admitted in Exhibit 'B'	480.00
"Direct back charges as admitted in Exhibit 'B'	87.52
"Total	\$12,489.52

"The master finds that certain stipulates had been between the defendants and the general contractor as to the amount which the defendants claim they were entitled to under their contract with London-Bicknell Company, and negotiations were had between the parties; that the total amount due to the defendants under their contract was \$22,870.51, defendants received on account \$192,327.00, leaving a balance of \$91,444.87; that said balance was paid to the defendants under a settlement whereby certain monies were deposited with the Guardian Trust Company of New York, City, under an escrow agreement dated the 8th day of December, 1931.

"After the filing of the suit herein, the plaintiff received from the Guardian Trust Company, an account of its claim, the sum of \$4,900.74, which plaintiff credits to the account of the defendants, and there is no contest as to this credit.

"The defendants did not receive the entire amount which they claim was due them and to their subcontractors, specifically

the shortage amounted to \$31,544.85, showing a loss to the defendants of 14.09%.

"The plaintiff was not a party to any agreements of compromise or settlement between the defendants on the one hand and Lundoff-Bicknell Company on the other hand.

"After the settlements were consummated, the defendants released and discharged the general contractor and the owner from all claims that they had, both on their own behalf and on the behalf of their subcontractors, and the claim of the defendants, both on their own behalf and on behalf of the plaintiff, was extinguished.

"The Master found that the plaintiff had at no time granted to the defendants any authority to compromise in any way or reduce the claim of the plaintiff in any amounts, and if any reduction of plaintiff's claim was made by the defendants in their settlement or compromise, it was made without any authority from the plaintiff."

After analyzing the pleadings and the evidence the master concluded that the material allegations of the complaint had been proven; that the equities in the case were with plaintiff; and that there was due plaintiff from defendants \$2,854.31, which included a balance of \$2,343.60 for extras and \$510.71 interest from May 31, 1936 to October 10, 1940.

All objections by both parties to the master's report having been overruled, they were allowed to stand as exceptions thereto. The trial court overruled all exceptions to the master's report except that which concerned the right of plaintiff to recover interest of \$510.71 from May 31, 1936 to October 10, 1940, which allowance was recommended by the master. After sustaining defendants' exception to the allowance of this interest, the chancellor entered the decree in plaintiff's favor for \$2,343.60.

Plaintiff's appeal seeks a modification of the decree to the end that certain items of interest be added to the principal amount of \$2,343.60 which defendants were decreed to pay plaintiff.

Defendants cross appeal seeks the reversal of the decree for \$2,343.60 in favor of plaintiff.

The evidence amply sustains the findings of the master

the shortage amounted to \$1,744.37, showing a loss to the defendants of 14.09%.

"The plaintiff was not a party to any agreement of compromise or settlement between the defendants on the one hand and Landolt-Blickstein Company on the other hand.

"After the settlement was consummated, the defendants released and discharged the general contractor and the owner from all claims that they had, both on their own behalf and on the behalf of their subcontractors, and the claim of the defendants, both on their own behalf and on behalf of the plaintiff, was extinguished.

"The master found that the plaintiff had at no time granted to the defendants any authority to compromise in any way or reduce the claim of the plaintiff in any account, and if any reduction of plaintiff's claim was made by the defendants in their settlement or compromise, it was made without any authority from the plaintiff."

After analyzing the pleadings and the evidence the master concluded that the material allegations of the complaint had been proven; that the equities in the case were with plaintiff; and that there was due plaintiff from defendants \$2,824.37, which included a balance of \$1,744.37 for extras and \$1,080 interest from May 31, 1936 to October 1, 1940.

All objections by both parties to the master's report having been overruled, they were allowed to stand as exceptions thereto. The trial court overruled all exceptions to the master's report except that which concerned the right of plaintiff to recover interest of \$10.71 from May 31, 1936 to October 1, 1940, which allowance was recommended by the master. After sustaining defendants' exception to the allowance of this interest, the chancellor entered the decree in plaintiff's favor for \$2,843.00. Plaintiff's appeal seeks a modification of the decree to the end that certain items of interest be added to the principal amount of \$2,343.00 which defendants were decreed to pay plaintiff.

Defendants cross appeal seeks the reversal of the decree for \$2,343.00 in favor of plaintiff. The evidence and findings of the master

and the decree of the court that after plaintiff had completely performed its two contracts with defendants and furnished extra labor and materials as requested by the latter, there was a balance of \$7,250.30 due and owing from defendants to plaintiff; that May 31, 1936 plaintiff was paid \$4,906.74 on account of such balance by the Guardian Trust Company of Cleveland, Ohio, out of an escrow fund theretofore created for such purpose; and that the balance due plaintiff from defendants was thereby reduced to \$2,343.60.

It will be noted, however, that defendants were not liable to pay plaintiff this balance unless and until they received payment to that extent from the general contractor, Lundoff-Bicknell Company. It will also be noted that defendants did not receive from the general contractor payment of the balance due plaintiff but that defendants settled and compromised with the general contractor for an amount considerably less than the balance due them, which compromise included the settlement of the balance due plaintiff and deprived the latter as a subcontractor of its right of action against the general contractor and the owner.

The master's findings concerning defendants' settlement agreement with the general contractor, which were approved by the chancellor were as follows:

"The plaintiff was not a party to any agreements of compromise or settlement between the defendants on the one hand, and Lundoff-Bicknell Co., general contractor, and the owners, on the other hand. *** After the settlements were consummated, the defendants released and discharged the general contractor and the owner from all claims that they had, both on their own behalf, and on behalf of their subcontractors, and the claim of the defendants, both on their own behalf, and on behalf of the plaintiff, was extinguished.

"The plaintiff at no time granted to the defendants any authority to compromise in any way, or reduce the claim of the plaintiff in any amount, and if any reduction of plaintiff's claim was made by the defendants in their settlement or compromise it was made without any authority from the plaintiff."

There is sufficient evidence in the record to support these findings and it cannot be said that they were against the manifest

and the decree of the court that the plaintiff had completely performed its two contracts with defendants and furnished extra labor and materials as requested by the latter, there was a balance of \$7,250.30 due and owing from defendants to plaintiff; that on 31, 1936 plaintiff was paid \$4,900.74 on account of such balance by the Garbrian Trust Company of Cleveland, Ohio, out of an escrow fund therefore created for such purpose; and that the balance due plaintiff from defendants was thereby reduced to \$2,349.60. It will be noted, however, that defendants were not liable to pay plaintiff this balance unless and until they received payment to that extent from the general contractor, Lindoff-Ricknell Company. It will also be noted that defendants did not receive from the general contractor payment of the balance due plaintiff but that defendants settled and compromised with the general contractor for an amount considerably less than the balance due them, which compromise included the settlement of the balance due plaintiff and deprived the latter as a subcontractor of its right of action against the general contractor and the owner. The master's findings concerning defendants' settlement agreement with the general contractor, which were approved by the chancellor were as follows:

"The plaintiff was not a party to any agreement of compromise or settlement between the defendants on the one hand, and Lindoff-Ricknell Co., general contractor, and the owners, on the other hand. *** After the settlements were consummated, the defendants released and discharged the general contractor and the owner from all claims that they had, both on their own behalf, and on behalf of their subcontractors, and the claim of the defendants, both on their own behalf, and on behalf of the plaintiff, was extinguished.

"The plaintiff at no time granted to the defendants any authority to compromise in any way, or reduce the claim of the plaintiff in any amount, and if reduction of plaintiff's claim was made by the defendants in their settlement or compromise it was made without any authority from the plaintiff."

There is sufficient evidence in the record to support these findings and it cannot be said that they were against the manifest

weight of the evidence.

Since it is conceded that defendants did not receive from the general contractor funds with which to pay plaintiff the balance due it, no liability could attach to defendants for their failure to pay plaintiff, unless they had precluded themselves from making any demand for payment upon the general contractor or had released said general contractor from liability for payment. "Provisions in subcontracts that the subcontractor shall not be entitled to payment until the contractor has secured his compensation from the owner are valid and enforceable; but if the contractor has by his own fault lost the right to payment from the owner, the subcontractor will be entitled to his compensation." (17 C. J. S. 1058.)

In Rumsey v. Livers, 112 Md. 546, the question was presented as to whether a subcontractor was entitled to recover from a general contractor where the latter by his own act lost the right to payment from the owner. There the court said at pp. 552, 553:

"The payment of the compensation he had earned from the defendants could not be perpetually postponed merely because the company (owner) refrained from paying its debt to the defendants (general contractor) or because they omitted or refused to enforce its collection. They could insist upon their right to withhold payment from the plaintiff until their receipt of funds from the company only by asserting their right under their contract with the company to the payment of the sums to which they were entitled. *** If the defendants committed a breach of this condition in consequence either of neglect or affirmative election, both of which are charged in the declaration, we see no reason why the stipulation in question should still remain available to them as a ground for postponing the payment of the plaintiff's demand."

In Foreman-State Trust & Savings Bank, Adm'r Estate of Frances Tauber, dec'd v. Joseph Tauber, executor Estate of Max Tauber, dec'd, 262 Ill. App. 614, this court, in an opinion written by Justice Otto Kerner, said at p. 617:

"It has repeatedly been held that where one party to a contract shows that the other party has deliberately made it impossible for the contract to be performed by some act of his done prior to the time that performance was to be made, such

weight of the evidence.

Since it is conceded that defendants did not receive from the general contractor funds with which to pay plaintiff the balance due it, no liability could attach to defendants for their failure to pay plaintiff, unless they had procured themselves from making any demand for payment upon the general contractor or had released said general contractor from liability for payment. "Provisions in subcontract that the subcontractor shall not be entitled to payment until the contractor has secured his compensation from the owner are valid and enforceable; but if the contractor has by his own fault lost the right to payment from the owner, the subcontractor will be entitled to his compensation." (17 C. J. 2, 1058.)

In Amesbury v. Livers, 112 Md. 246, the question was presented as to whether a subcontractor was entitled to recover from a general contractor where the latter by his own act lost the right to payment from the owner. There the court said at pp. 252, 253:

"The payment of the compensation he had earned from the defendants could not be perpetually postponed merely because the company (owner) refrained from paying its debt to the defendants (general contractor) or because they omitted or refused to enforce its collection. They could insist upon their right to withhold payment from the plaintiff until their receipt of funds from the company only by asserting their right under their contract with the company to the payment of the sums to which they were entitled. If the defendants committed a breach of this condition in consequence either of a direct or indirect election, both of which are charged in the declaration, we see no reason why the allegation in question should still remain available to them as a ground for postponing the payment of the plaintiff's demand."

In Forner-Steph Trust v. Savings Bank, Ains' Estate of
Frances Taber, dec'd v. Joseph Taber, executor Estate of
Taber, dec'd, 202 Ill. App. 614, this court, in an opinion written by Justice Otto Forner, said at p. 617:

"It has repeatedly been held that where one party to a contract shows that the other party has deliberately made it impossible for the contract to be performed by some act of his done prior to the time that performance was to be made, such

act, in law, amounts to a prevention of performance."

In affirming the Tauber case in Foreman Trust & Savings Bank v. Tauber, 348 Ill. 280, the Supreme court used this language at p. 286:

"It is well established by the authorities that a party to a contract who by his deliberate act prevents the fulfillment of a condition on which his liability under the contract depends, cannot take advantage of his own wrongful conduct and assert the failure of the fulfillment of the condition to defeat his liability under the contract."

Since defendants without plaintiff's authority entered into the settlement agreement with the general contractor whereby releasing and discharging said general contractor and the owner from all claims that they had against them, including plaintiff's claim, they must be held to have wrongfully brought about the extinguishment of plaintiff's claim against the general contractor and the owner. In our opinion defendants are clearly liable to pay plaintiff the balance due it.

Plaintiff insists that it is entitled to an allowance of five per cent interest on \$7,250.24 from October 22, 1931, when it rendered its statement of account for that amount to defendants after the completion of its work and payment of said account was refused, to May 31, 1936, when it was paid \$4,906.74 on its account by the Guardian Trust Company. In the first instance plaintiff predicates its right to recover the interest above indicated under that portion of sec. 2, par. 2, chap. 74, Ill. Rev. Stat. 1941, which provides: "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing." (Italics ours.) There is no merit in this contention. Plaintiff's right to recover herein is not based upon its written contracts with defendants but rather upon defendants unauthorized settlement of plaintiff's claim with the general contractor, which extinguished plaintiff's right to recover from said

act, in law, amounts to a prevention of performance."

In affirming the Talbot case in Foran Trust & Savings

Bank v. Talbot, 348 Ill. 280, the Supreme Court used this language

at p. 286:

"It is well established by the authorities that a party to a contract who by his deliberate act prevents the fulfillment of a condition on which his liability under the contract depends, cannot take advantage of his own wrongful conduct and assert the failure of the fulfillment of the condition to defeat his liability under the contract."

Since defendants without plaintiff's authority entered into

the settlement agreement with the general contractor thereby releasing and discharging said general contractor and the owner from all claims that they had against them, including plaintiff's claim, they must be held to have wrongfully brought about the extinguishment of plaintiff's claim against the general contractor and the owner. In our opinion defendants are clearly liable to pay plaintiff the balance due it.

Plaintiff insists that it is entitled to an allowance of five per cent interest on \$250.24 from October 22, 1931, when it rendered its statement of account for that amount to defendants after the completion of its work and payment of said account was refused, to May 31, 1932, when it was paid \$4,906.74 on its account by the Guardian Trust Company. In the first instance plaintiff predicates its right to recover the interest above indicated under that portion of sec. 2, par. 2, chap. 74, Ill. Rev. Stat. 1941, which provides: "Creditors shall be allowed no more as to rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing." (Italics ours.) There is no writ in this connection. Plaintiff's right to recover herein is not based upon its written contracts with defendants but rather upon defendants unauthorized settlement of plaintiff's claim with the general contractor, which extinguished plaintiff's right to recover from said

general contractor and the owner.

Plaintiff claims that in any event it is entitled to recover such interest because the foregoing balance was "withheld by an unreasonable and vexatious delay of payment." Just what are the facts? As already stated there was a balance of \$7,250.24 due plaintiff from October 22, 1931, when its demand upon defendants for the payment of its account was refused, until May 31, 1936, when it received the payment of \$4,906.74 from the Guardian Trust Company. Certainly plaintiff was not entitled to interest from October 22, 1931 to December 8, 1932 when defendants entered into the settlement agreement with the general contractor, since it is conceded that during said period defendants received no payment from the general contractor either on their own or on plaintiff's behalf. At the time defendants' settlement agreement of December 8, 1932 was made certain funds to effect such settlement were deposited by the general contractor in escrow with the Guardian Trust Company. Before these funds could be distributed said trust company was forced to discontinue its banking business because of financial difficulties and it was not until 1936 that the escrowed funds were released for distribution. It was out of these funds, which were held in escrow by the Guardian Trust Company, that plaintiff was finally paid \$4,906.74 on May 31, 1936. Surely defendants could not fairly be charged with unreasonable and vexatious delay of payment of that amount during the period from December 8, 1932 to May 31, 1936. Although this suit was started May 22, 1934 no effort was made by plaintiff to bring it to trial until the cause was referred to a master for hearing December 5, 1939, more than five and one-half years after the commencement of the action. In addition, as the master found, there was a dispute between the parties as to the extra work and materials furnished by plaintiff.

It would be highly inequitable under the circumstances

General contractor and the owner.

Plaintiff claims that in any event it is entitled to recover such interest because the foregoing balance was withheld by an unreasonable and vexatious delay of payment. Just what are the facts? As already stated there was a balance of \$4,906.74 due plaintiff from October 22, 1931, when its demand upon defendant for the payment of its account was refused, until May 31, 1936, when it received the payment of \$4,906.74 from the Guardian Trust Company. Certainly plaintiff was not entitled to interest from October 22, 1931 to December 8, 1932 when defendants entered into the settlement agreement with the general contractor, since it is conceded that during said period defendants received no payment from the general contractor either on their own or on plaintiff's behalf. At the time defendants' settlement agreement of December 8, 1932 was made certain funds to effect such settlement were deposited by the general contractor in escrow with the Guardian Trust Company. Before these funds could be distributed said trust company was forced to discontinue its banking business because of financial difficulties and it was not until 1936 that the escrowed funds were released for distribution. It was out of these funds, which were held in escrow by the Guardian Trust Company, that plaintiff was finally paid \$4,906.74 on May 31, 1936. Surely defendants could not fairly be charged with unreasonable and vexatious delay of payment of that amount during the period from December 8, 1932 to May 31, 1936. Although this suit was started May 22, 1934 no effort was made by plaintiff to bring it to trial until the case was tried to a verdict for hearing December 5, 1939, more than five and one-half years after the commencement of the action. In addition, as the master found, there was a dispute between the parties as to the exact work and materials furnished by plaintiff.

It would be highly inadvisable under the circumstances

to hold that defendants were guilty of such unreasonable and vexatious delay in withholding payment of plaintiff's claim as to warrant the allowance of interest on its balance of \$7,250.24 from October 22, 1931, when payment of same was due, until May 31, 1936, when the Guardian Trust Company paid it \$4,906.74 on account of said balance.

As to plaintiff's claim for interest on the balance of \$2,343.60 found to be due it under the decree, we think that the chancellor was fully justified in disallowing same in accordance with the equities of the case. Interest on this balance was claimed for the period from May 31, 1936, when the \$4,906.74 was paid plaintiff by the Guardian Trust Company, until the date of the entry of the decree. As heretofore stated there was an honest dispute as to at least some of the items of extras and although this case was pending for almost two years prior to May 31, 1936 the first day of the period for which the interest under consideration is claimed, plaintiff permitted this suit to remain dormant until December 5, 1939, when it was referred to the master in chancery.

Other points are urged but in the view we take of this case we deem further discussion unnecessary.

For the reasons stated herein the decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

to hold that defendants were guilty of such negligence and vexatious delay in withholding payment of plaintiff's claim as to warrant the allowance of interest on its balance of \$7,575.44 from October 22, 1931, when payment of same was due, until May 31, 1936, when the Guardian Trust Company paid it \$4,906.74 on account of said balance.

As to plaintiff's claim for interest on the balance of \$2,343.80 found to be due it under the decree, we think that the chancellor was fully justified in disallowing same in accordance with the equities of the case. Interest on this balance was claimed for the period from May 31, 1936, when the \$4,906.74 was paid plaintiff by the Guardian Trust Company, until the date of the entry of the decree. As heretofore stated there was an honest dispute as to at least some of the items of extras and although this case was pending for almost two years prior to May 31, 1936 the first day of the period for which the interest under consideration is claimed, plaintiff permitted this suit to remain dormant until December 2, 1939, when it was referred to the master in chancery.

Other points are raised but in the view we take of this case we deem further discussion unnecessary.

For the reasons stated herein the decree of the Circuit Court of Cook County is affirmed.

DECEMBER AFFIRMED.

Friend and Seelman, JJ., concur.

42167

316 I.A. 442

BESSIE SIMON,
Appellant,

v.

PAULA BALASIC and
ALFRED BALASIC,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On October 29, 1940 plaintiff, Bessie Simon, procured a default judgment for \$424.60, which included a finding of malice, against defendants, Paula Balasic and Alfred Balasic. This judgment was set aside on March 19, 1941 after a hearing on defendants' petition in the nature of a writ of error coram nobis to vacate same. On April 7, 1941 plaintiff filed her notice of appeal from the order of March 19, 1941 vacating the judgment. All necessary steps were taken to present the appeal to the Appellate court for decision. Notwithstanding that said appeal (hereinafter for convenience referred to as the first appeal) was pending and had not as yet been disposed of by this court, this case appeared on a trial call in the Municipal court on July 1, 1941 and in the absence of plaintiff and her attorney an ex parte hearing was had which resulted in the entry of a judgment against plaintiff on her statement of claim and a judgment for \$63 against plaintiff and in favor of defendants on the latter's counterclaim. October 2, 1941 plaintiff filed a petition to vacate these last mentioned judgments alleging inter alia that the trial court had no jurisdiction to try the case or to enter such judgments and that said judgments were void since they were rendered while the first appeal was pending in this court. On October 21, 1941 an order was entered by the trial court denying plaintiff's motion to vacate the judgments of July 1, 1941. It is from this order that plaintiff appeals.

It is inconceivable that a trial judge, unless he was not advised of the pending appeal, would proceed with the trial of a

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42167

BESSIE SIMON
Appellant,
v.
PAULA BALASIC and
ALFRED BALASIC
Appellees.

APPEAL FROM JUDICIAL COURT
OF CHICAGO.

MR. PRESIDING JUDGE SULLIVAN D-DIRECTED THE ACTION OF THE COURT.

On October 29, 1940 plaintiff, Bessie Simon, procured a default judgment for \$424.60, which included a finding of negligence against defendants, Paula Balasic and Alfred Balasic. This judgment was set aside on March 19, 1941 after a hearing on defendants' petition in the nature of a writ of error coram nobis to vacate same. On April 7, 1941 plaintiff filed her notice of appeal from the order of March 19, 1941 vacating the judgment. All necessary steps were taken to present the appeal to the Appellate Court for decision. Notwithstanding that said appeal (hereinafter for convenience referred to as the first appeal) was pending and had not as yet been disposed of by this court, this case appeared on a trial call in the Municipal Court on July 1, 1941 and in the absence of plaintiff and her attorney an ex parte hearing was had which resulted in the entry of a judgment against plaintiff on her statement of claim and a judgment for \$63 against plaintiff and in favor of defendants on the latter's counterclaim. October 2, 1941 plaintiff filed a petition to vacate these last mentioned judgments alleging inter alia that the trial court had no jurisdiction to try the case or to enter such judgments and that said judgments were void since they were rendered while the first appeal was pending in this court. On October 21, 1941 an order was entered by the trial court denying plaintiff's motion to vacate the judgments of July 1, 1941. It is from this order that plaintiff appeals.

It is inconceivable that a trial judge, unless he was not

case and enter judgment therein during the pendency of an appeal which involved the merits of the same cause. As heretofore shown the judgments in question here were entered July 1, 1941 and the first appeal, wherein the notice of appeal was filed April 7, 1941, was not decided by this court until February 10, 1942. "An appeal is perfected when a notice thereof is filed in the trial court in the form and within the time prescribed. When it is filed, the case proceeds in the court of review not as a new case but as a continuation of the one that was pending in the trial court. The jurisdiction of the Appellate Court to take the case attaches when the notice of appeal is filed in the trial court." Francke v. Eadie, 373 Ill. 500. It is elementary that after the notice of appeal (first appeal) was filed in the trial court that court lost jurisdiction of the cause and the jurisdiction of this court attached and continued until that appeal was disposed of. While the first appeal was pending in this court the trial court had no power to enter any order involving a matter of substance. The first appeal in and of itself stayed all further proceedings in the Municipal court.

Defendants insist that "in the absence of an appeal bond, a supersedeas or other stay order, the proceedings in the trial court were not stayed." There is absolutely no merit in this contention. Defendants apparently misconceive the purpose of a supersedeas. It is only when an appellant desires that his appeal "operate as a suspension of the execution of the (judgment or decree)," (Rule 3, section 4, Rules of Practice, Appellate court, First District of Illinois), that it is necessary that such appeal be made a supersedeas and that bond be furnished. The first appeal was not from a money judgment against the enforcement of which by execution it was necessary that plaintiff protect herself by having her appeal made a supersedeas. Said appeal by plaintiff was from an order vacating a default judgment theretofore entered in her

case and enter judgment therein during the pendency of an appeal which involved the merits of the same cause. As heretofore shown the judgments in question here were entered July 1, 1941 and the first appeal, wherein the notice of appeal was filed April 7, 1941, was not decided by this court until February 10, 1942. "An appeal is perfected when a notice thereof is filed in the trial court in the form and within the time prescribed. When it is filed, the case proceeds in the court of review not as a new case but as a continuation of the one that was pending in the trial court. The jurisdiction of the Appellate Court to take the case attaches when the notice of appeal is filed in the trial court. It is elementary that after the notice of appeal (first appeal) was filed in the trial court that court lost jurisdiction of the cause and the jurisdiction of this court attached and continued until that appeal was disposed of. While the first appeal was pending in this court the trial court had no power to enter any order involving a matter of substance. The first appeal in and of itself stayed all further proceedings in the trial court. Defendants insist that "in the absence of an appeal bond, a supersedeas or other stay order, the proceedings in the trial court were not stayed." There is absolutely no merit in this contention. Defendants apparently misconceive the purpose of a supersedeas. It is only when an appellant desires that his appeal "operate as a suspension of the execution of the judgment or decree," (Rule 3, section 4, Rules of Practice, Appellate court, First District of Illinois), that it is necessary to post such appeal bond as a supersedeas and that bond be furnished. The first appeal was not from a money judgment against the respondent of which by execution it was necessary that plaintiff protect herself by having her appeal bond made a supersedeas. And appeal by plaintiff was from an order appointing a receiver and defendant heretofore entered in her

favor and as already stated all proceedings in the cause were stayed by the filing of the notice of appeal on the first appeal without said appeal having been made a supersedeas and without the filing of an appeal bond.

The mere statement of the circumstances shows that the position taken by defendants on this appeal is untenable. If a trial court were permitted to proceed with the trial of a case which was already pending on appeal in this court the resulting situation might well be that the judgment rendered by the trial court would be inconsistent with and contradictory to the judgment entered by this court.

The trial court lost jurisdiction of this case when the notice of appeal was filed April 7, 1941 on the first appeal taken in this case. Therefore the judgments entered July 1, 1941 were void and should have been vacated on plaintiff's motion.

For the reasons stated herein the order of the trial court, denying plaintiff's motion to vacate the judgments entered July 1, 1941, is reversed and the cause is remanded with directions to allow the motion to vacate said judgments and that further proceedings be had consistent with the views expressed in our opinion filed in the first appeal on February 10, 1942, and pursuant to the judgment of this court entered on said date.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

favor and as already stated all proceedings in this case were stayed by the filing of the writ of appeal on the first appeal without said appeal having been made a supersedeas was without the filing of an appeal bond.

The same statement of the circumstances above and the position taken by defendants on this appeal is unnecessary. It is a trial court was permitted to proceed with the trial of a case which has already pending on appeal in this court the resulting situation might be that the judgment rendered by the trial court would be inconsistent with and contrary to the law entered by this court.

The trial court took jurisdiction of this case when the notice of appeal was filed April 7, 1941 on the first appeal taken in this case. Therefore the judgment entered July 1, 1941 very void and should have been vacated on plaintiff's motion.

For the reasons stated herein the order of the trial court denying plaintiff's motion to vacate the judgment entered July 1, 1941, is reversed and the cause is remanded with directions to

allow the motion to vacate said judgment and that further proceedings be had consistent with the writ expressed in the opinion filed in the first appeal on February 10, 1941, and pursuant to the judgment of this court entered on said date.

WITNESSE MY HAND AND SEAL OF OFFICE
THIS TWENTY-THIRD DAY OF JULY, 1941.

W. H. HARRIS, Clerk of Court.

42239

316 I.A. 443¹

LILLIE LINDSEY,
Appellant,

v.

GOLDBLATT BROS. INC., a
corporation, JOYCE DETECTIVE
AGENCY, Inc., a corporation,
et al.,

Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

26

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The Joyce Detective Agency was employed by Goldblatt Bros., Inc., which operated a department store, to protect it against thieves and shoplifters. Representatives of the Joyce Detective Agency apprehended Lillie Lindsey, the plaintiff herein, in said department store and filed a criminal complaint in the Municipal court charging her with the larceny from Goldblatt's store of the hat she was wearing at the time of her apprehension. She was released on bond after her arrest and incarceration. Thereafter she was tried in the Municipal court and the charge against her was dismissed for want of prosecution. Prior to such dismissal she signed a written release exonerating Goldblatt Bros., Inc., and the Joyce Detective Agency and their agents from all liability for her arrest and prosecution.

In the instant case plaintiff filed two complaints, one at law and one in chancery, in which she named as defendants, Goldblatt Bros., Inc., Joyce Detective Agency, Inc., and certain agents of said corporations. In her complaint at law she charged the defendants with false imprisonment, malicious assault and malicious prosecution and alleged that defendants procured the aforementioned release from her by duress. In her complaint in chancery plaintiff sought a decree directing the cancellation of the release on the ground that same had been obtained by duress. After a hearing on plaintiff's complaint in chancery the trial court entered a decree which found the issues against her, denied

3101A 443

42239

LILLIE LINDSEY,
Appellant,

APPEAL FROM SUPREME COURT,
COOK COUNTY.

GOLDBLATT BROS., INC., a
corporation, JOYCE DETECTIVE
AGENCY, Inc., a corporation,
et al.,
Appellees.

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court charging her with the larceny from Goldblatt's store of the
hat she was wearing at the time of her apprehension. She was
released on bond after her arrest and incarceration. Thereafter
she was tried in the Municipal court and the charge against her
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aforementioned release from her by duress. In her complaint in
chancery plaintiff sought a decree directing the cancellation of
the release on the ground that same had been obtained by duress.
After a hearing on plaintiff's complaint in chancery the trial
court entered a decree which found the issues against her, denied

her the relief sought and dismissed said complaint for want of equity. Plaintiff appeals from the decree.

The theory of plaintiff's complaint on the question of duress seems to be in effect that her own attorney, the assistant states' attorney, who prosecuted the charge against her in the Municipal court, a representative of Goldblatt Bros. Department Store and the Joyce Detective Agency and the trial judge in said court conspired to secure the release from her by repeated threats that if she did not sign same she would be found guilty and fined and that because of her weakened mental and physical condition caused by the indignities and assaults theretofore suffered by her at the hands of defendants she succumbed to said threats and signed the release.

It appeared that the trial of the criminal charge against plaintiff in the Municipal court commenced about noon on May 13, 1941; that a number of witnesses testified; and that after all the testimony had been heard and the closing arguments concluded the trial judge declared a recess and retired to his chambers.

The substance of plaintiff's testimony in the instant case was that after the judge declared the recess in her Municipal court trial, her own attorney, one McCahill, who disappeared some time after said trial and was not available as a witness in this proceeding, came to her from the judge's chambers and told her that the judge said that if she did not settle with the defendants and give them a release he would find her guilty and fine her; that she protested to her attorney that she was innocent and did not want to settle or sign a release; that McCahill then went back into the judge's chambers and shortly returned to her stating that the judge insisted that if she would not sign the release he would find her guilty and fine her; and that because of her weakened condition and the aforesaid threats that if she did not sign the release she would be found guilty and fined, she signed same.

her the relief sought and dismissed said complaint for want of equity. Plaintiff appeals from the decree.

The theory of plaintiff's complaint on the question of duress seems to be in effect that her own attorney, the assistant states' attorney, who prosecuted the charge against her in the Municipal court, a representative of Goldblatt Bros. Department Store and the Joyce Detective Agency and the trial judge in said court conspired to secure the release from her by repeated threats that if she did not sign same she would be found guilty and fined and that because of her weakened mental and physical condition caused by the indignities and assaults theretofore suffered by her at the hands of defendants she succumbed to said threats and signed the release.

It appeared that the trial of the criminal charge against plaintiff in the Municipal court commenced about noon on May 12, 1941; that a number of witnesses testified; and that after all the testimony had been heard and the closing arguments concluded the trial judge declared a recess and retired to his chambers.

The substance of plaintiff's testimony in the instant case was that after the judge declared the recess in her Municipal court trial, her own attorney, one McCaill, who disappeared some time after said trial and was not available as a witness in this proceeding, came to her from the judge's chambers and told her that the judge said that if she did not settle with the defendants and give them a release he would find her guilty and fine her; that she protested to her attorney that she was innocent and did not want to settle or sign a release; that McCaill then went back into the judge's chambers and shortly returned to her stating that the judge insisted that if she would not sign the release he would find her guilty and fine her; and that because of her weakened condition and the aforesaid threats that if she did not sign the release she would be found guilty and fined, she signed same.

The material portions of the testimony herein of assistant state's attorney Myron L. Lewis as to what transpired in connection with the trial of the Municipal court case follow:

"A. After arguments of Counsel were heard, the Judge took a recess and went into Chambers. He started to eat his lunch. That was customary. At about that time I went into Chambers to eat my lunch. While we were there, the attorney representing Miss Lindsey came into Chambers.

"***

"A. He started a discussion relative to the merits of his case. We argued up and back; started arguing the case all over again. We argued up and back there for a while. The Judge indicated after listening to us, he was going to rule with the State; to find her guilty. Then Mr. McCahill said - whether he knew the Judge I do not know - but apparently he did. He pleaded with the Judge not to give this woman a record and the Judge indicated that if he satisfied Goldblatt's in some way, why, that would be all right with him, but the crux of the matter rested with Goldblatts.

"Q. What happened after that?

"A. I finished my lunch. I went over with Mr. McCahill. We called over Mr. Boltz, who was from Goldblatt. He began to talk with Mr. McCahill about a release.

"Q. Did you hear the conversation?

"A. Most of it.

"Q. What was said?

"A. I know he started out by asking for three hundred dollars, under those circumstances he would get a release. I told them both to forget it. Let's get a ruling from the Court. I told Boltz under those circumstances I would not dismiss the case myself. They still discussed how much they were going to settle for. I told Boltz not to settle it, although I did not tell him what the Judge had indicated because I felt that was more in the nature of a confidential indication by the Court. And finally, the next I remember about the conversation they practically agreed upon fifty dollars.

"Q. What happened after that?

"A. Then Miss Lindsey was called over after the conversation and I could hear some of the conversation McCahill had with Miss Lindsey.

"He said: 'I think the Court was going to find you guilty and the only way we can get out of this is give a release to Goldblatt's, and I have talked them into giving us fifty dollars.' I heard them say something about three hundred dollars. She said 'I will do whatever you think is right.'

"The windup was that Mr. Boltz had a form of release in his

The material portions of the testimony herein of the state's attorney Byron J. Lewis as to what transpired in connection with the trial of the Municipal Court case follow:

"A. After arguments of Counsel were heard, the Judge took a recess and went into Chambers. He started to eat his lunch. That was customary. At about that time I and Miss Lindsay went to eat my lunch. While we were there, the attorney representing Miss Lindsay came into Chambers.

"A. I started a discussion relative to the merits of his case. We argued up and back; started arguing the case all over again. I argued up and back there for a while. The Judge indicated after listening to us, he was going to rule with the State; to find her guilty. Then Mr. MacMillan said - whether he knew the Judge I do not know - but apparently he did. He pleaded with the Judge not to give this woman a second trial. The Judge indicated that if he recalled Goldblatt's in some way, that would be all right with him, but the crux of the matter rested with Goldblatt.

"Q. What happened after that?

"A. I finished my lunch. I went over with Mr. MacMillan. We called over Mr. Bolts, who was from Goldblatt. We began to talk with Mr. MacMillan about a release.

"Q. Did you hear the conversation?

"A. Most of it.

"Q. What was said?

"A. I know he started out by asking for three hundred dollars under those circumstances he would get a release. I told them both to forget it. Let's get a ruling from the Court. I told Bolts under those circumstances I would not discuss the case myself. They still discussed how much they were going to settle for. I told Bolts not to settle it, although I did not tell him what the Judge had indicated because I felt that was more in the nature of a confidential indication by the Court. And finally, the next I remember about the conversation they were still agreed upon fifty dollars.

"Q. What happened after that?

"A. Then Miss Lindsay was called over after the conversation and I could hear some of the conversation MacMillan was with Miss Lindsay.

"Q. She said: 'I think the Court was going to find her guilty and the only way we can get out of this is give a release to Goldblatt's, and I have talked them into giving us fifty dollars.' I heard them say something about three hundred dollars. She said 'I will be whatever you think is right.'

"Q. The witness was that Mr. Bolts had a form of release in his

pocket. I did not want that used because of certain language that was used in the release. I remember I gave that release, after filling in the space there, I gave that release to Miss Sheridan, a young lady there who was the Court reporter at that time in the case. I asked her if she would go downstairs somewhere and find a typewriter and prepare the release.

"Q. Did she prepare the release?

"A. She did. She prepared the release and it was signed by Miss Lindsey and I signed and the money was turned over to her lawyer in her presence.

"Q. Did you see the money turned over to her lawyer? A. Yes.

"Q. By Whom? A. It was turned over to McCahill by Mr. Bolt.

"Q. Did you see it [the release] signed by Miss Lindsey?
A. Yes.

"Q. And did you see the other witnesses sign it? A. Yes.

"CROSS-EXAMINATION

"Mr. RIEGER: Q. Who was present?

"A. Mr. McCahill was, and the Judge was there; I was there, and I think there were one or two court attaches.

"Q. Was Mr. Boltz in chambers? A. No.

"Q. Was anybody in from Goldblatt's? A. No.

"Q. Did you see this money turned over to Mr. McCahill?
A. Why, yes.

"Q. Where was the money turned over?

"A. Right there, at the end of counsel table at the end, in front of the bench.

"Q. Was Miss Lindsey there? A. She was right there.

"Q. Who turned the money over to Mr. McCahill? A. Mr. Boltz

"Q. Did he offer to turn it over to Miss Lindsey?

"A. There was no offer to turn it over to anybody. Boltz gave him the money and she was right there.

"Q. Did the Judge come out of his Chambers?

"A. After the release was prepared, we notified him we were ready to proceed with the matter then.

"Q. Was Miss Lindsey in the courtroom when the Judge came out?

"A. She was right there alongside of the table by the bench.

Q. I did not want that used because it was in a pocket. I was used in the release. I remember I gave that release, I was filling in the space there, I gave that release to the Chamberlain, a young lady there who was the Court reporter at that time in the case. I asked her if she would go down to the court and give a typewriter and prepare the release.

Q. Did she prepare the release?

A. She did. She prepared the release and it was signed by Miss Lindsay and I signed and the money was turned over to her lawyer in her presence.

Q. Did you see the money turned over to her lawyer, A. Yes.

Q. By whom? A. It was turned over to Goldhill by Mr. Goldhill.

Q. Did you see it [the release] signed by Miss Lindsay? A. Yes.

Q. And did you see the other witnesses sign it? A. Yes.

"CROSS-EXAMINATION"

Q. Mr. Lindsay, C. the was present?

A. Mr. McGalliff was, and the judge was there; I was there, and I think there were one or two court attaches.

Q. Was Mr. Goldhill in chambers? A. No.

Q. Was anybody in from Goldhill's? A. No.

Q. Did you see this money turned over to Mr. McGalliff?

A. Yes, yes.

Q. Where was the money turned over?

A. Right there, at the end of counsel table at the end, in front of the bench.

Q. Was Miss Lindsay there? A. She was right there.

Q. Who turned the money over to Mr. McGalliff? A. Mr. Goldhill.

Q. Did he offer to turn it over to Miss Lindsay?

A. There was no offer to turn it over to anybody. Goldhill gave him the money and she was right there.

Q. Did the judge come out of his chambers?

A. After the release was prepared, he notified him we were ready to proceed with the latter claim.

Q. As Miss Lindsay in the courtroom when the judge came

out?

A. She was right there alongside of the table by the

"THE COURT: What happened?

"A. After the release was executed, I told the Court - Judge - apparently they agreed to dispose of the matter, by giving a release and I told them Goldblatt's had turned over fifty dollars to Mr. McCahill for Miss Lindsey. The Judge said, 'If Goldblatt's is satisfied -' I think he said to Mr. Boltz, 'Is Goldblatt's satisfied?' He said, 'Yes, Judge, we are satisfied.' Then the Judge said, 'All right, dismiss the suit for want of prosecution.'

"THE COURT: Was this plaintiff, Miss Lindsey there?

"A. She was standing right in front of the court.

"Q. Did she make any statement? A. No statement of any kind.

"MR. RIEGER: Q. Did you hear Miss Lindsey object to any settlement there?

"A. No, there seemed to be some discussion between her and McCahill about the amount.

"Q. There was discussion?

"A. About the three hundred dollars and the fifty dollars, and she said: 'Whatever you want to do.'

Edwin G. Boltz, who was the personnel director of the Joyce Detective Agency and represented said agency and "Goldblatt's" at plaintiff's trial in the Municipal court, testified herein that he was not present and did not participate in any conversation or discussion in the judge's chambers between the attorneys and the judge and that he had no conversation with the judge from the time the recess was declared until the release had been signed and the judge had returned to the bench; that plaintiff's attorney and the assistant state's attorney came out of the judge's chambers and the former approached him with a proposition to settle; that after considerable "dickering" he agreed to pay plaintiff \$50 if she would sign a release; that McCahill had several conversations with Miss Lindsey and that he heard her attorney tell her in one of those conversations that he thought the judge would find her guilty; that she thereupon said "I think this is the best way to dispose of this;" and that she then signed the release and he paid her attorney \$50 in her

"THE COURT: What happened?

"A. After the release was executed, I told the Court - Judge - apparently they agreed to dispose of the matter, by giving a release and I told them Goldblatt's had turned over fifty dollars to Mr. McCall for Miss Lindsey. The Judge said, 'If Goldblatt's is satisfied -' I think he said to Mr. Goldblatt, 'Yes, Judge, we are satisfied.' Then the Judge said, 'All right, discharge the suit for want of prosecution.'

"THE COURT: Was this plaintiff, Miss Lindsey charged?

"A. She was standing right in front of the court.

"Q. Did she make any statement? A. No statement of any kind.

"MR. RICHES: Q. Did you hear Miss Lindsey object to any settlement there?

"A. No, there seemed to be some discussion between her and McCall about the amount.

"Q. There was discussion?

"A. About the three hundred dollars and the fifty dollars, and she said: 'Whatever you want to do.'

Dwain G. Miller, who was the personnel director of the Joyce

Detective Agency and represented said agency and "Goldblatt's" as

plaintiff's trial in the Municipal court, testified herein that he

was not present and did not participate in any conversation or dis-

cussion in the Judge's chambers between the attorneys and the Judge

and that he had no conversation with the Judge from the time the

recess was declared until the release had been signed and the Judge

had returned to the bench; that plaintiff's attorney and the assist-

ant state's attorney came out of the Judge's chambers and the former

approached him with a proposition to settle; that after considerable

"bickering" he agreed to pay plaintiff \$500 and she would sign a re-

lease; that McCall had several conversations with Miss Lindsey

and that he heard her attorney tell her in one of those conversations

that he thought the Judge would find her guilty; that she thereupon

said "I think this is the best way to dispose of this;" and that

she then signed the release and he said her attorney \$500 in her

behalf and in her presence.

Other witnesses testified in the case at bar as to the execution of the release by plaintiff and that her signature to such release was witnessed by the assistant state's attorney and two other persons. There was also some testimony as to plaintiff's mental and physical condition on the day of her trial in the Municipal court.

It should be noted that plaintiff's then attorney, McCahill, did not turn over to her the \$50 paid in settlement and for her release, or any part of it. She made a complaint against him to the Chicago Bar Association but abandoned same.

It is insinuated by plaintiff's counsel that Boltz was in the judge's chambers with McCahill and the assistant state's attorney and that as a result of a conference between the three of them and the trial judge the latter directed plaintiff's attorney to tell her that she would be found guilty and fined if she did not settle and release the "Goldblatts." There is not a word of evidence in the record that any such thing occurred or that Boltz or anybody else representing any of the defendants attended any conference in the judge's chambers or talked to him during the recess. What did occur, according to the undisputed testimony of the assistant state's attorney, was that when McCahill persisted in trying to convince the judge in chambers that plaintiff was not guilty of the criminal charge, the judge indicated to him that he was going to find her guilty. McCahill "pleaded with the judge not to give this woman a record" and the judge "indicated that if he satisfied the Goldblatt's in some way *** that would be all right with him." It was then that McCahill approached Boltz in the courtroom with the result heretofore shown.

That plaintiff was apparently satisfied with the settlement at the time she signed the release in the Municipal court is indicated by her statement "I will do whatever you think is right,"

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behalf and in her presence.

Other witnesses testified in this case as to the

execution of the release by plaintiff and that her signature to

such release was witnessed by the assistant state's attorney and

two other persons. There was also some testimony as to plaintiff's

mental and physical condition on the day of her trial in the

municipal court.

It should be noted that plaintiff's then attorney, McNeill,

did not turn over to her the \$20 paid in settlement and for her re-

lease, or any part of it. She made a complaint against him to the

Chicago Bar Association but abandoned same.

It is indicated by plaintiff's counsel that she was in

the judge's chambers with McNeill and the assistant state's attorney

and that as a result of a conference between the three of them and

the trial judge the latter directed plaintiff's attorney to tell

her that she would be found guilty and fined if she did not settle

and release the "Goldblatts." There is not a word of evidence in

the record that any such thing occurred or that told or anybody

else representing any of the defendants attended any conference in

the judge's chambers or talked to him during the recess. There did

occur, according to the undisputed testimony of the assistant

state's attorney, was that when McNeill testified in trying to

convince the judge in chambers that plaintiff was not guilty of

the criminal charge, the judge indicated to him that he was going

to find her guilty. McNeill "pleaded with the judge not to give

this woman a record" and the judge "indicated that if he acquitted

the Goldblatts in some way *** that would be all right with him."

It was then that McNeill approached Walter in the courtroom with

the result her before shown.

That plaintiff was apparently satisfied with the agreement

at the time she signed the release in the municipal court is in-

dicted by her statement "I will do whatever you want it right."

which the assistant state's attorney testified he heard her make to McCahill and it is further indicated by the fact that she made no protest that she had been imposed upon when the trial judge returned to the bench and was advised as to the settlement and release.

When the instant case went to trial there was a motion pending to strike plaintiff's complaint. Plaintiff now contends that the trial court erred in proceeding with the trial without an answer having been filed by defendants. "Parties going to trial without raising any question of a lack of pleas, waive the necessity of written pleas and formal issues joined." Farley v. Dean, 196 Ill. App. 389.

Since there is no competent evidence in the record to show that the defendants were guilty of duress or coercion as charged in plaintiff's complaint in chancery same was properly dismissed by the chancellor for want of equity.

If it can be said that there was any conflict in the evidence as to any issue of fact herein the findings of fact of the chancellor who saw the witnesses and heard them testify will not be disturbed unless they are manifestly against the weight of the evidence. The findings of the chancellor are amply sustained by the evidence.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

which the assistant state's attorney testified he heard her make to McCahill and it is further indicated by the fact that she made no protest that she had been imposed upon when the trial judge returned to the bench and was advised as to the settlement and release.

When the instant case went to trial there was a motion pending to strike plaintiff's complaint. Plaintiff now contends that the trial court erred in proceeding with the trial without an answer having been filed by defendants. "Parties going to trial without raising any question of a lack of pleadings, waive the necessity of written pleas and formal answer joined." *Farley v. Dean*, 196 Ill. App. 389.

Since there is no competent evidence in the record to show that the defendants were guilty of duress or coercion as charged in plaintiff's complaint in coming by same was properly dismissed by the chancellor for want of equity. It can be said that there was any conflict in the evidence as to any issue of fact herein the findings of fact of the chancellor who saw the witnesses and heard their testimony will not be disturbed unless they are manifestly against the weight of the evidence. The findings of the chancellor are amply sustained by the evidence.

The decree of the Superior Court of Cook County is

affirmed.

DOUGLAS W. BROWN,

Friend and Counsel, Pl., contra.

41986

316 I.A. 443²

W. C. TACKETT,
Appellee,

v.

ARTHUR J. REBMANN and
ADELAIDE C. REBMANN,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order of the Circuit court denying their motion and petition to vacate and set aside a judgment of November 7, 1941 for \$4,013.70 which was entered by confession on a note dated October 12, 1935 for \$2,900.

In February 1927 defendants had contracted for the purchase of two lots from Elmore's Westchester Realty Trust, of which Foreman's Trust & Savings Bank was trustee, and by March 1932 \$2,950 of the purchase price remained unpaid. A deed was then delivered to defendants, who at the same time executed a note to plaintiff for \$2,950, payable in monthly installments over a period of five years and secured by purchase money mortgage on their lots. Default having occurred as to certain installments, plaintiff subsequently had judgment by confession on the note for \$3,401.25 in the Municipal court of Chicago, case No. 2771060. July 17, 1934 an attempt at settlement was made, wherein plaintiff advised defendants by letter of that date that he had agreed to settle the Municipal court judgment on the following terms:

"We have agreed to accept an assignment of four (4) shares of Commonwealth Edison Stock, receipt of which is hereby acknowledged, and we have further agreed to reduce the balance of the judgment obtained in the above entitled cause to \$900, said balance to be payable as follows: Ten dollars (\$10) on the 17th day of July, 1934, and Ten Dollars (\$10) or more on the 17th day of each and every month thereafter, said balance to be payable within two (2) years, all payments to be applied on the above entitled judgment.

"It is hereby agreed that time is of the essence of this agreement. All payments shall be made within a reasonable time of the due date, and a reasonable time is hereby

W. C. TACKETT,
Appellee,

v.

ARTHUR J. REBMAN and
ADELAIDE C. REBMAN,
Appellants.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE PRIND DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order of the Circuit Court denying their motion and petition to vacate and set aside a judgment of November 7, 1941 for \$4,013.70 which was entered by confession on a note dated October 12, 1935 for \$2,900.

In February 1927 defendants had contracted for the purchase of two lots from Elmore's Westchester Realty Trust, of which Foreman's Trust & Savings Bank was trustee, and by March 1932 \$2,950 of the purchase price remained unpaid. A deed was then delivered to defendants, who at the same time executed a note to plaintiff for \$2,950, payable in monthly installments over a period of five years and secured by purchase money mortgages on their lots. Plaintiff having occurred as to certain installments, plaintiff subsequently had judgment by confession on the note for \$3,401.25 in the Circuit Court of Chicago, case No. 2771060. July 17, 1934 an attempt at settlement was made, wherein plaintiff advised defendants by letter of that date that he had agreed to settle the judgment court judgment on the following terms:

"We have agreed to accept an assignment of four (4) shares of Commonwealth Edison stock, receipt of which is hereby acknowledged, and we have further agreed to reduce the balance of the judgment obtained in the above entitled cause to \$900, said balance to be payable as follows: Ten dollars (\$10) on the 17th day of July, 1934, and ten dollars (\$10) or more on the 17th day of each and every month thereafter, said balance to be payable within two (2) years, all payments to be applied on the above entitled judgment."

"It is hereby agreed that time is of the essence of this agreement. All payments shall be made within a reasonable time of the due date, and a reasonable time is hereby

agreed to be five (5) days.

"It is further understood that in the event a default is made in any monthly payment, the judgment above-described shall automatically be reinstated for the full amount with the exception of the credit of \$220 given on the abovementioned four (4) shares of Commonwealth Edison Stock, less any amounts paid in, for which credit shall be given."

For reasons which do not appear of record that attempted settlement was abandoned, and thereafter October 22, 1935 plaintiff addressed another letter to defendants, acknowledging receipt of a judgment note for \$2,900 "in consideration of my releasing judgment in the Municipal Court *** in the sum of \$3,401.25, plus costs," upon the following terms:

"It is further understood and agreed that Lura B. Tackett agrees to settle said note of \$2,900 for the sum of \$800, said sum of \$800 to be payable as follows: \$20 on the 17th day of November, 1935, \$10 on the 17th day of December, 1935, and \$10 or more on the 17th day of each and every month thereafter until the sum of \$800 is fully paid, providing that said sum of \$800 is paid on or before July 17, 1936.

"It is further agreed that time is of the essence and that all payments shall be made within a reasonable time of the due date, and a reasonable time is herewith agreed to be five days.

"It is further agreed that if default is made in any monthly payment the full sum of said judgment note of \$2,900 (minus all payments made to the date of default) shall be immediately due and payable at the option of the legal holder thereof."

Notwithstanding the abandonment of the proposed settlement of July 17, 1934, the four shares of Commonwealth Edison stock, which had been delivered to plaintiff, were not returned but were sold and credited to defendants' indebtedness. In accordance with the subsequent letter of October 22, 1935 the Municipal court judgment was released and the secured note for \$2,900 was settled for \$900, on which the sum of \$100 was subsequently paid. The remaining balance of \$800 was payable in installments maturing in July 1936 upon condition, however, that if defendants defaulted in any monthly installment, the full sum of \$2,900, less any payments made up to the date of default, should become immediately due and payable at the option of the legal holder of the note.

agreed to be five (5) days.

"It is further understood that in the event a default is made in any monthly payment, the judgment above described shall automatically be reinstated for the full amount with the exception of the credit of \$250 given on the above-mentioned four (4) shares of Commonwealth Edison stock, less any amounts paid in, for which credit shall be given."

For reasons which do not appear of record but attempted settlement was abandoned, and thereafter October 22, 1935 plaintiff addressed another letter to defendants, acknowledging receipt of a judgment note for \$2,900 "in consideration of my releasing judgment in the Municipal Court in the sum of \$7,401.25, plus costs," upon the following terms:

"It is further understood and agreed that June 17, 1936, agrees to settle said note of \$2,900 for the sum of \$800, said sum of \$800 to be payable as follows: \$200 on the 17th day of November, 1935; \$100 on the 17th day of December, 1935; and \$100 on or before the 17th day of each and every month thereafter until the sum of \$800 is fully paid, providing that said sum of \$800 is paid on or before July 17, 1936."

"It is further agreed that time is of the essence and that all payments shall be made within a reasonable time of the due date, and a reasonable time is hereby agreed to be five days."

"It is further agreed that if default is made in any monthly payment the full sum of said judgment note of \$2,900 (minus all payments made to the date of default) shall be immediately due and payable at the option of the legal holder thereof."

Notwithstanding the abandonment of the proposed settlement of July 17, 1934, the four shares of Commonwealth Edison stock, which had been delivered to plaintiff, was not returned but were sold and credited to defendants' indebtedness. In accordance with the subsequent letter of October 22, 1935, the Municipal Court judgment was released and the second note for \$2,900 was settled for \$900, on which the sum of \$100 was subsequently paid. The remaining balance of \$800 was payable in installments maturing in July 1936 upon condition, however, that if a default is made in any monthly installment, the full sum of \$2,900, less any payments made up to the date of default, should become immediately due and payable at the option of the legal holder of the note.

Plaintiff takes the position that defendants defaulted in the payment of the \$800 which they had agreed to pay in lieu of the \$2,900 note, and therefore he was entitled to recover the amount of \$2,900, plus interest, under the terms of the agreement of October 22, 1935. Defendants' petition to vacate the judgment, on the other hand, alleged that they are not in default in payment of the \$800 agreed to be paid in settlement of the debt, claiming by way of defense that on May 7, 1936 they had paid to one F. B. Cozzi, who originally sold them the lots in question and to whom they claimed to have delivered the four shares of Commonwealth Edison stock, the sum of \$650, and further claiming that they obtained from Cozzi a receipt "as being the balance due from the defendants to said plaintiff," a copy of which, allegedly signed by Cozzi, together with the two foregoing letters, was attached to their petition for setting aside the judgment in question.

In answer to defendants' petition plaintiff filed the counteraffidavit of F. B. Cozzi, wherein he alleged in substance that as salesman for Howard Elmore he had sold the two lots in question to defendants; that neither of defendants, nor anyone on their behalf, had on May 7, 1936, or at any other time, paid to him the sum of \$650; that he did not on May 7, 1936, or at any other time, issue to defendants, or to anyone on their behalf, the original receipt, a copy of which is attached to the petition herein; that subsequent to 1934 he did not see the petitioners, or either of them, nor did he talk to them by telephone, communicate with them, or have any business relations with them whatsoever; that he severed his connection with the real estate firm in the early part of 1934 and obtained employment with the Peoples Gas Company of Illinois on August 10 of that year, where he is still employed; that since his association with the Peoples

Plaintiff takes the position that defendants defrauded in the payment of the \$800 which they had agreed to pay in lieu of the \$2,900 note, and therefore he was entitled to recover the amount of \$2,900, plus interest, under the terms of the agreement of October 22, 1935. Defendants' petition to vacate the judgment, on the other hand, alleged that they are not in default in payment of the \$800 agreed to be paid in settlement of the debt, claiming by way of defense that on May 7, 1936 they had paid to one T. B. Cozart, who originally sold them the lots in question and to whom they claimed to have delivered the four shares of Commonwealth Edison stock, the sum of \$650, and further claiming that they obtained from Cozart a receipt "as being the balance due from the defendants to said plaintiff," a copy of which, allegedly signed by Cozart, together with the two foregoing letters, was attached to their petition for setting aside the judgment in question.

In answer to defendants' petition plaintiff filed the counteraffidavit of T. B. Cozart, wherein he alleged in substance that as salesman for Howard Timons he had sold the two lots in question to defendants; that neither of defendants, nor anyone on their behalf, had on May 7, 1936, or at any other time, paid to him the sum of \$650; that he did not on May 7, 1936, or at any other time, issue to defendants, or to anyone on their behalf, the original receipt, a copy of which is attached to the petition herein; that subsequent to 1934 he did not see the petitioners, or either of them, nor did he talk to them by telephone, correspondence with them, or have any business relations with them in any way; that he severed his connection with the real estate firm in the early part of 1934 and obtained employment with the Peoples Gas Company of Illinois on August 10 of that year, where he is still employed; that since his association with the Peoples

Gas Company he has not at any time been engaged by plaintiff in any capacity whatsoever; and that he did not collect, or attempt to collect, any moneys whatsoever from defendants, or from any other persons, on behalf of plaintiff since August 10, 1934.

Plaintiff also filed the counteraffidavit of W. C. Tackett, plaintiff herein, alleging that Cozzi left his employ in the early part of 1934; that at no time subsequent to that date did he employ Cozzi in any capacity whatsoever; that he did not authorize Cozzi to collect any money from defendants, nor did he receive any money from Cozzi since the early part of 1934, nor did he communicate with him, or have any transactions whatsoever with Cozzi since that time. It is further alleged that December 2, 1935 he received \$20 from defendants to apply on said note, but received no further payments thereafter; that he had no knowledge whatsoever that defendants paid, or claimed to have paid, to Cozzi the sum of \$650, or any sum whatsoever; that he has been the owner of the note confessed upon since the date of its execution, and defendants did not, nor did anyone in their behalf, make any claim upon him for the return of the note.

The record discloses that by means of answers to interrogatories propounded by plaintiff to Adelaide C. Rebmann in May, 1941 the latter admitted that she received a telephone call on or about the 21st day of November, 1940 from Julia Brady, the garnishee defendant, notifying her of the judgment in the matter in this cause, and on the same day a counteraffidavit was filed by counsel of record for plaintiff setting forth a true and correct copy of a letter dated January 9, 1941, addressed to Arthur J. Rebmann, one of the defendants, notifying him of the entry of the judgment November 6, 1940, and suggesting that he deliver the letter to an attorney and seek his advice. The affidavit further alleges that defendant Adelaide C. Rebmann, at the taking of her oral deposition,

Gas Company he has not at any time been engaged by Plaintiff in any capacity whatsoever; and that he did not collect, or attempt to collect, any money whatsoever from defendants, or from any other persons, on behalf of Plaintiff since August 10, 1934.

Plaintiff also filed the counter-affidavit of W. C. Tackett, Plaintiff herein, alleging that Goetz left his employ in the early part of 1934; that at no time subsequent to that date did he employ Goetz in any capacity whatsoever; that he did not authorize Goetz to collect any money from defendants, nor did he receive any money from Goetz since the early part of 1934, nor did he communicate with him, or have any transactions whatsoever with Goetz since that time. It is further alleged that December 2, 1932 he received \$20 from defendants to apply on said note, but received no further payments thereafter; that he had no knowledge whatsoever that defendants paid, or claimed to have paid, to Goetz the sum of \$50, or any sum whatsoever; that he has been the owner of the note confessed upon since the date of its execution, and defendants did not, nor did anyone in their behalf, make any claim upon him for the return of the note.

The record discloses that by means of answers to interrogatories propounded by Plaintiff to Adelaide C. Reppmann in May, 1941 the latter admitted that she received a telephone call on or about the 21st day of November, 1940 from Julia Brady, the garnishee defendant, notifying her of the judgment in the matter in this cause, and on the same day a counter-affidavit was filed by counsel of record for Plaintiff setting forth a true and correct copy of a letter dated January 9, 1941, addressed to Arthur J. Reppmann, one of the defendants, notifying him of the entry of the judgment November 6, 1940, and suggesting that he deliver the letter to an attorney and seek his advice. The affidavit further alleges that defendant Adelaide C. Reppmann, at the taking of her oral deposition,

admitted that she received this letter from plaintiff's counsel.

In addition to the foregoing documents, plaintiff filed a third counteraffidavit of Herbert J. Walter, an examiner of questioned documents, who said that he had 30 years' experience in the scientific investigation of forgery, handwriting, identification of typewriting and typewriters, erasures, etc.; that he had complete photographic, optical and chemical apparatus devoted exclusively to the discovery of facts in all phases of questioned documents, and that he had qualified in many courts of the United States and Canada in numerous cases, including United States v. Alphonse Capone, State of New Jersey v. Bruno Hauptmann (Lindbergh case) and State of New York v. Strewl (O'Connell kidnaping case); that he had been retained by plaintiff in this cause to examine a document dated May 7, 1936 which purported to certify the receipt by F. B. Cozzi of the sum of \$650 from defendants; that he examined the document in question and compared it with genuine standards by visual means, with magnifying glasses, under compound microscope, and under ultra-violet light; that as a result of his examination he was of opinion that the receipt in question is a carefully imitated or traced document, not written or signed by Cozzi.

Upon this state of the record the matter came up for hearing June 3, 1941 on petition of defendants to vacate the judgment by confession and the foregoing counteraffidavits filed by plaintiff. All the parties were present before the court, together with their counsel, as well as Cozzi and the handwriting expert H. J. Walter. In response to the court's question as to what was presented for determination, plaintiff's counsel responded that "this matter comes on to be heard on a petition to vacate a judgment by confession and on counter affidavits filed by order of the court by plaintiff. The plaintiff has two (2) grounds as to why the petition should not be granted, First, petition alleges payment in full. This allegation is based on a purported receipt, a photostatic copy

admitted that she received this letter from Plaintiff's counsel.

In addition to the foregoing documents, Plaintiff filed a third counteraffidavit of Herbert J. Walter, an examiner of questioned documents, who said that he had 30 years' experience in the scientific investigation of forgery, handwriting, identification of typewriting and typewriters, erasures, etc.; that he had complete photographic, optical and chemical apparatus devoted exclusively to the discovery of facts in all phases of questioned documents, and that he had qualified in many courts of the United States and Canada in numerous cases, including United States v. Alphonse Gagne, State of New Jersey v. Bruno Handberg (Dimbergh case) and State of New York v. Irene J. O'Connell (Kidnapping case); that he had been retained by Plaintiff in this case to examine a document dated May 7, 1936 which purported to certify the receipt by R. B. Goetz of the sum of \$650 from defendants; that he examined the document in question and compared it with genuine standards by visual means, with magnifying glasses, under compound microscope, and under ultra-violet light; that as a result of his examination he was of opinion that the receipt in question is a genuine receipt, fully imitated or traced document, not written or signed by Goetz.

Upon this state of the record the matter came up for hearing June 3, 1941 on petition of defendants to vacate the judgment by confession and the foregoing counteraffidavits filed by Plaintiff. All the parties were present before the court, together with their counsel, as well as Goetz and the handwriting expert H. J. Walter.

In response to the court's question as to what was presented for determination, Plaintiff's counsel responded that "this matter comes on to be heard on a petition to vacate a judgment by confession and on counteraffidavits filed by order of the court by Plaintiff. The Plaintiff has two (2) grounds as to why the petition should not be granted. First, petition alleges payment in full. This allegation is based on a purported receipt, a photostatic copy

of which is attached to petition. Plaintiff is prepared to prove that this receipt was a forgery. Second, that petition does not allege diligence on the part of defendants to present petition to vacate judgment. Plaintiff is prepared to prove that defendants had not been diligent in presenting their petition." The court thereupon directed plaintiff to "Go ahead with your evidence as to forgery," and Mr. Walter took the stand and testified in great detail as to his qualifications, the means that he had employed in examining the questioned receipt, including a comparison of enlarged photographs of Cozzi's original signature with that attached to the receipt, and reasons for his opinion that the receipt was a carefully imitated and traced document, neither written nor signed by Cozzi. Mr. Walter was cross-examined by counsel for defendants and testified that persons do not write the same way all the time, that signatures always differ in some slight respect from time to time, but that the characteristics of signatures remain the same. The court thereupon inquired if there was any other testimony. Counsel for plaintiff said that he had no further evidence, but relied also on the contention that defendants were not diligent in presenting their petition, and called the court's attention to the answer to interrogatory signed by Adelaide C. Rebmann and filed May 21, 1941, showing that defendants knew about the judgment which was entered November 21, 1940 and that Mrs. Rebmann had admitted in an oral deposition that she had received a letter from plaintiff's counsel in January, 1941 advising her of the judgment and suggesting that she employ counsel to represent her. He also called the court's attention to a letter from counsel for defendants dated February 18, 1941, addressed to plaintiff's counsel, tending to show that defendants had knowledge of the entry of the judgment more than 30 days prior to the filing on April 14, 1941 of their petition to vacate the same and were

of which is attached to petition. Plaintiff is prepared to prove that this receipt was a forgery. Second, that petition does not allege diligence on the part of defendants to present petition to vacate judgment. Plaintiff is prepared to prove that defendants had not been diligent in presenting their petition. The court thereupon directed plaintiff to "go ahead with your evidence as to forgery," and Mr. Walter took the stand and testified in great detail as to his qualifications, the means that he had employed in examining the questioned receipt, including a comparison of enlarged photographs of Corral's original signature with that attached to the receipt, and reasons for his opinion that the receipt was a carefully imitated and traced document, neither written nor signed by Corral. Mr. Walter was cross-examined by counsel for defendants and testified that persons do not write the same way all the time, that signatures always differ in some slight respect from time to time, but that the characteristics of signatures remain the same. The court thereupon inquired if there was any other testimony. Counsel for plaintiff said that he had no further evidence, but relied also on the contention that defendants were not diligent in presenting their petition, and called the court's attention to the answer to interrogatory signed by Adelaide C. Rehrman and filed May 21, 1941, showing that defendants knew about the judgment which was entered November 21, 1940 and that Mrs. Rehrman had admitted in an oral deposition that she had received a letter from plaintiff's counsel in January, 1941 advising her of the judgment and suggesting that she employ counsel to represent her. He also called the court's attention to a letter from counsel for defendants dated February 18, 1941, addressed to plaintiff's counsel, tending to show that defendants had knowledge of the entry of the judgment more than 30 days prior to the filing on April 14, 1941 of their petition to vacate the same and were

therefore not diligent in presenting their petition. No further testimony was offered by defendants, although they had an opportunity to do so, and the court thereupon denied the petition to vacate the judgment and entered the order from which this appeal is taken.

It is first urged that the note upon which judgment was confessed involved a penalty and was therefore void from its inception, and various decisions in this state are cited in support of the contention. The gravamen of the argument advanced by defendants is that where by the terms of a contract a greater sum, which is not the actual debt, is agreed to be paid in case of default of a lesser sum at a given time, the provisions for the payment of the greater sum will be held to be a penalty. The rule seems to be otherwise, however, "Where the larger sum mentioned *** is the actual debt, and a smaller sum has been agreed upon as a release, if paid under stated conditions." Under such circumstances the failure to comply with the easier terms gives the creditor the right to enforce the payment of the larger sum. (Waggoner v. Cox, 40 Ohio St. 539; Am. & Eng. Encyc. of Law, 2d ed., vol. XIX, p. 418, sec. 5.) In the case at bar defendants were released from a judgment for \$3,401.25 by executing a note for \$2,900. Assuming that the judgment was collectable, defendants received more than full consideration for their note. The larger sum of \$2,900 appears to have been the actual debt, and failure to comply with the terms of the settlement gave plaintiff the right to enforce the payment of the larger sum. Defendants contend that the consideration for the release of the judgment for \$3,401.25 was a promise to pay \$800 in the future and that if it were not paid the only sum to be recovered would be \$800. This contention is predicated on the erroneous assumption that the \$2,900 note should be entirely disregarded, and upon this theory they argue that any sum in excess of \$800 is a penalty. It is only upon the

theory that the note for \$2,900 involved a penalty that defendants seek to sustain their contention that the note was void from its inception. For the reasons given, we think this assumption is untenable.

It is next urged that even if the entire sum of \$650 acknowledged by the questioned receipt had not been paid, as plaintiff claims, the measure of his recovery would be the unpaid balance of the \$800 and the legal interest thereon recoverable in a proper action brought therefor, and it is argued in connection with this point that the note would still be void. Defendants cite and rely upon Armour v. Moore, 5 Ill. App. 433. In that case a note for \$550 was given, \$500 was the sum actually received, and \$100 thereof remained unpaid. Thereafter a judgment was obtained by the holder of the note in the sum of \$307.40. The court found that the \$50 actually retained for interest was usurious, and held that plaintiff was entitled to recover \$100. In reaching this conclusion the court said: "The statute allows the recovery of the sum actually loaned, notwithstanding the reservation of usury." That decision is not applicable to the circumstances of the case before us. Here there was actually due the face amount of the note, \$2,900, plus interest, less credit for any moneys paid, plus attorneys' fees. The question of usury is not an issue, and therefore Armour v. Moore, and other cases relied on by defendants are not applicable.

Considerable argument is advanced by both parties on the question of whether or not there was a novation, but in view of our conclusion as to the validity of the note, discussion of that question is unnecessary.

Plaintiff also argues with considerable force that the judgment is valid because defendants were not diligent in presenting their petition to vacate. Whether the trial court considered this point does not appear of record, but it is evident

theory that the note for \$2,900 involved a remedy that defendants seek to sustain their contention that the note was void from its inception. For the reasons given, we think this assumption is untenable.

It is next urged that even if the entire sum of \$670 acknowledged by the questioned receipt had not been paid, as plaintiff claims, the measure of his recovery would be the unpaid balance of the \$600 and the legal interest thereon recoverable in a proper action brought therefor, and it is argued in connection with this point that the note would still be void. Defendants cite and rely upon Armour v. Moore, 2 Ill. App. 433. In that case a note for \$750 was given, \$500 was the sum actually received, and \$100 thereof remained unpaid. Thereafter a judgment was obtained by the holder of the note in the sum of \$107.40. The court found that the \$70 actually retained for interest was usurious, and held that plaintiff was entitled to recover \$100. In reaching this conclusion the court said: "The statute allows the recovery of the sum actually loaned, notwithstanding the reservation of usury." That decision is not applicable to the circumstances of the case before us. Here there was actually due the face amount of the note, \$1,900, plus interest, less credit for any monies paid, plus attorneys' fees. The question of usury is not an issue, and therefore Armour v. Moore and other cases relied on by defendants are not applicable.

Considerable argument is advanced by both parties on the question of whether or not there was a novation, but in view of our conclusion as to the validity of the note, discussion of that question is unnecessary.

Plaintiff also argues with considerable force that the judgment is valid because defendants were not diligent in presenting their petition to vacate. Whether the trial court com-

that both defendants, as well as their counsel, were advised of the entry of the judgment in due time and inexcusably delayed taking steps to set it aside. They argue that since the judgment was void from its inception because it expressed a penalty, as they contend, the question of diligence does not enter into the case. But in view of our adverse holding on this point we think the question of diligence properly entered into the consideration of the case.

Defendants ask that the "decision of the Circuit Court *** should be reversed." No other relief is sought. Manifestly they are not entitled to such relief. Upon the record presented the trial court was justified in concluding that defendants had defaulted in the payment of the conditional settlement for \$800, and under the terms of that agreement plaintiff was entitled to recover the amount of the note upon which the settlement was predicated and for which there was a valid consideration, plus interest and costs.

The judgment of the Circuit court is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

that both defendants, as well as their counsel, were advised of the entry of the judgment in due time and immediately thereafter taking steps to set it aside. They argue that since the judgment was void from its inception because it expressed a penalty, as they contend, the question of diligence does not enter into the case. But in view of our adverse holding in this point we think the question of diligence properly entered into the consideration of the case.

Defendants ask that the "decision of the Circuit Court" should be reversed. "No other relief is sought. Manifestly they are not entitled to such relief. Upon the record presented the trial court was justified in concluding that defendants had defaulted in the payment of the conditional settlement for \$800, and under the terms of that agreement plaintiff was entitled to recover the amount of the note upon which the settlement was predicated and for which there was a valid consideration, plus interest and costs.

The judgment of the Circuit Court is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

316 I.A. 444

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

OPINION ON REHEARING.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

An opinion was filed in this cause June 19, 1942 and thereafter rehearing was granted. Defendants reaffirm the assertions made in their original brief that notice of the filing of the complaint, the application for an injunction and the pendency of the suit was never served upon them, and that they first became aware of the foreclosure proceeding when alias summons was served upon them December 6, 1940, almost two years after the complaint was filed. It is difficult to reconcile this contention with the affidavit of plaintiff's counsel that he served notice of the pendency of the suit on December 16, 1938, the day the complaint was filed, by leaving two copies thereof with Antonina Czajkowski at defendants' usual place of abode in the town of Layden. However, assuming that defendants were not served with notice of the pendency of the suit on that day, and that they resided elsewhere, as they contend, we have their admission that personal service of the alias summons was had upon them before they were defaulted for failure to appear, before the matter was referred to the master for hearing and before the decree was entered against them on June 30, 1941. It is therefore evident that they had notice of the pendency of the suit for more than six months before the entry of the decree, but took no steps to assert any defense they might have had. Their sole appearance after being served with summons was for the purpose of challenging the court's jurisdiction on the ground that

THEODORE O. WRIGHT,
Appellee,

APPEAL FROM CIRCUIT COURT,

COOK COUNTY,

AND
ANTONIA GAZKOWSKI et al.,
Appellants.

OPINION ON REMITTANCE.

JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

An opinion was filed in this cause June 19, 1945 and thereafter remittance was granted. Defendants relying on assertions made in their original brief that notice of the filing of the complaint, the application for an injunction and the pendency of the suit was never served upon them, and that they first became aware of the foreclosure proceedings when alias summons was served upon them December 6, 1940, almost two years after the complaint was filed. It is difficult to reconcile this contention with the affidavit of plaintiff's counsel that he served notice of the pendency of the suit on December 16, 1938, the day the complaint was filed, by leaving two copies thereof with Antonina Gaskowski at defendants' usual place of abode in the town of Jayden. However, assuming that defendants were not served with notice of the pendency of the suit on that day, and that they resided elsewhere, as they contend, we have their admission that personal service of the alias summons was had upon them before they were defaulted for failure to appear, before the matter was referred to the master for hearing and before the decree was entered against them on June 30, 1941. It is therefore evident that they had notice of the pendency of the suit for more than six months before the entry of the decree, but took no steps to assist any defense they might have had. Their sole appearance after being served with summons was for the purpose of challenging the court's jurisdiction on the ground that

the court had no power to issue the alias summons in December, 1940. This contention is predicated on Daly v. City of Chicago, 295 Ill. 276, and an additional authority, Snyder v. Whitney, 310 Ill. App. 297, which is cited for the first time in defendants' petition for rehearing. The Daly case, which was decided before the Civil Practice Act became effective, is discussed at length in our original opinion. The Civil Practice Act and rules of the Supreme court applicable thereto empower the court to order the issuance of alias writs, and such an order was entered in this proceeding. The Snyder case originated in the Municipal court and the conclusion reached is predicated largely on specific rules of that court. Although the Daly case is cited in Snyder v. Whitney, counsel in that proceeding made no point of the fact that it was decided before the Civil Practice Act was adopted. Moreover, the alias summons in the Snyder case was issued by the clerk without an order of court. There was no provision or authority for such procedure, unless the court record contained the original summons with a return showing the defendants "not found." In the case at bar the alias writ was issued upon the order of the court, as provided by the statute, which presents an entirely different situation.

We again point out, as we did in our original opinion, that although defendants had an opportunity to file their answer in this proceeding and present such defense as they might have, they declined to do so and relied solely on the ground that the court lacked jurisdiction of the parties.

In the light of these considerations we adhere to our original opinion and the decree of the Circuit court is therefore affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

the court had no power to issue the alias summons in December, 1940. This contention is predicated on Daly v. City of Chicago, 297 Ill. 276, and an additional authority, Myer v. Myer, 311 Ill. App. 297, which is cited for the first time in defendants' petition for rehearing. The Daly case, which was decided before the Civil Practice Act became effective, is discussed at length in our original opinion. The Civil Practice Act and rules of the Supreme court applicable thereto empower the court to order the issuance of alias writs, and such an order was entered in this proceeding. The Myer case originated in the municipal court and the conclusion reached is predicated largely on specific rules of that court. Although the Daly case is cited in Myer v. Myer, counsel in that proceeding made no point of the fact that it was decided before the Civil Practice Act was adopted. Moreover, the alias summons in the Myer case was issued by the court without an order of court. There was no provision or authority for such procedure, unless the court record contained the original summons with a return showing the defendants "not found." In the case at bar the alias writ was issued upon the order of the court, as provided by the statute, which presents an entirely different situation.

We again point out, as we did in our original opinion, that although defendants had an opportunity to file their answer in this proceeding and present such defense as they might have, they declined to do so and relied solely on the ground that the court lacked jurisdiction of the parties.

In the light of these considerations we adhere to our original opinion and the decree of the Circuit court is therefore affirmed.

JOSEPH W. BRYAN, J., concur.

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THEODORE O. UMBRIGHT,
Appellee,

v.

LUDWIK CZAJKOWSKI and
ANTONINA CZAJKOWSKI et al.,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

316 I.A. 444

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants Ludwik Czajkowski and Antonira Czajkowski appeal from a decree of the Circuit court foreclosing a trust deed securing an indebtedness of \$1,650, which, together with accrued interest, master's and attorney's fees, found defendants to be indebted to plaintiff in the aggregate sum of \$3,399.76. The appeal is prosecuted upon the theory that the court had no jurisdiction of defendants because the original summons was not served upon them, that the issuance of an alias summons was not warranted, and that their subsequent motions to set aside default and vacate the decree, supported by their limited appearance entered for the purpose of objecting to the jurisdiction of the court, were erroneously denied.

The foreclosure proceeding was filed December 16, 1938. The property was then in possession of one George Dohse, a tenant of the principal defendants. The same day plaintiff's attorney served notice on the principal defendants, as well as on Dohse and one Gerlach, trading as The Gerlach Company, and others that he would seek a temporary injunction to restrain all the defendants from removing any portion of the top soil from the premises sought to be foreclosed. Notice of this motion was personally served on the Czajkovskis December 16, 1938, and on the other defendants by delivering copies thereof to the contractor who was then engaged in removing the top soil from the premises.

THEODORE O. UMBRIGHT,
Appellee,
v.
LUDWIG CZAJKOWSKI and
ANTONIA CZAJKOWSKI et al.,
Appellants.

COCK COUNTY,

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants Ludwig Czajkowski and Antonia Czajkowski

appeal from a decree of the Circuit Court for Cock County, a trust deed securing an indebtedness of \$1,650, which, together with accrued interest, master's and attorney's fees, found delin-

quents to be indebted to plaintiff in the aggregate sum of \$2,399.76. The appeal is prosecuted upon the theory that the

court had no jurisdiction of defendants because the original summons was not served upon them, that the issuance of an alias summons was not warranted, and that their subsequent motions to

set aside default and vacate the decree, supported by their limited appearances entered for the purpose of objecting to the

jurisdiction of the court, were erroneously denied.

The foreclosure proceeding was filed December 16, 1938.

The property was then in possession of one George Heise, a tenant of the principal defendants. The same day plaintiff's attorney

served notice on the principal defendants, as well as on Heise and one Gerlach, trading as The Gerlach Company, and others that he would seek a temporary injunction to restrain all the defendants from removing any portion of the top soil from the premises sought to be foreclosed. Notice of this motion was personally

served on the Czajkowskis December 16, 1938, and on the other defendants by delivering copies thereof to the contractor who was then engaged in removing the top soil from the premises.

When the motion for a temporary injunction came up for hearing on December 19, it was continued without notice until December 21, when a reference was had to a master upon the injunctive phase of the proceeding. The master filed his report June 5, 1940. The delay between the motion for an injunction and the filing of the master's report was occasioned by conferences had between the parties in an attempt to settle their differences. The master recommended that an injunction issue, and after overruling exceptions to the master's report, the chancellor entered a permanent restraining order in accordance with the master's recommendations.

The original summons against the Czajkowskis had never been placed in the hands of the sheriff but was retained by plaintiff's counsel, presumably because the parties were endeavoring to negotiate a settlement. December 2, after the permanent injunction had been issued, plaintiff caused an alias summons to issue by direction of the court, which was served on the Czajkowskis December 6, 1940 by leaving a copy thereof with each of them personally at their place of residence.

Counsel for the principal defendants entered their special and limited appearance for the purpose of objecting to the jurisdiction of the court "in that the original summons was not returned by the sheriff and the clerk was not authorized to issue an alias summons," and in support thereof he also filed the affidavit of Ludwik Czajkowski stating that he had lived near the southeast corner of Higgins road and River road in Cook county continuously for twenty years, that he had resided there in December 1938, and that he was not served with a summons in the foreclosure proceeding until December 6, 1940.

January 27, 1941 counsel for plaintiff served notice on the attorney for the principal defendants advising him that he would, on the following day, ask for an order of default against

When the motion for a temporary injunction came up for hearing on December 19, it was continued without notice until December 21, when a reference was had to a master upon the injunctive phase of the proceeding. The master filed his report June 7, 1940. The delay between the motion for an injunction and the filing of the master's report was occasioned by several reasons and between the parties in an attempt to settle the differences. The master recommended that an injunction issue, and after overruling exceptions to the master's report, the chancellor entered a permanent restraining order in accordance with the master's recommendations. The original summons against the Gajkowskis had never been placed in the hands of the sheriff but was retained by Plaintiff's counsel, presumably because the parties were endeavoring to negotiate a settlement. December 2, after the permanent injunction had been issued, Plaintiff caused an alias summons to issue by motion of the court, which was served on the Gajkowskis December 6, 1940 by leaving a copy thereof with each of them personally at their place of residence.

Counsel for the principal defendants entered their special and limited appearance for the purpose of objecting to the jurisdiction of the court "in that the original summons was not returned by the sheriff and the clerk was not authorized to issue an alias summons," and in support thereof he also filed the affidavit of Indwiel Gajkowski stating that he had lived since the defendant's corner of Niagara road and River road in New Canaan continuously for twenty years, that he had resided there in December 1939, and that he was not served with a summons in the above-captioned proceeding until December 6, 1940.

January 27, 1941 counsel for Plaintiff served notices on the attorney for the principal defendants advising him that he would, on the following day, ask for an order of default against

the Czajkowskis and the other defendants who had been served with summons but had failed to appear in the proceeding, and also for a rereference of the foreclosure proceeding, on its merits, to a master in chancery. Defendants having failed to appear, they were accordingly defaulted by order of the court entered on that day, and the cause was referred generally to a master in chancery as requested.

Thereafter, February 19, 1941, attorney for the principal defendants served notice on plaintiff's counsel, as well as on Dohse's, that he would appear before the chancellor and ask that the default against the Czajkowskis theretofore entered, be vacated and the suit dismissed. This motion was continued for five days for the purpose of allowing defendants' attorney to present a petition, and February 25, 1941 he renewed his motion to vacate the default, quash the alias summons and return of the sheriff, and to dismiss the suit as to the Czajkowskis under their limited appearance. The petition or affidavit of A. E. Lake, attorney for the principal defendants, alleged in substance that the foreclosure proceeding had been filed December 16, 1938; that summons was duly issued but was never served on any of the defendants; that no return was made thereon by the sheriff; that the summons was then in the files bearing an indorsement by plaintiff's attorney that it had not been served; that on December 2, 1940 an alias summons, on order of court, was issued against the Czajkowskis and duly served; that thereafter, December 31, 1940, they filed a special and limited appearance with affidavit attached for the purpose of objecting to the jurisdiction of the court; that thereafter, January 28, 1941, a notice was served upon Victor G. Nardi, attorney for George Dohse, but not upon the principal defendants or their attorney, asking that a default be entered against the Czajkowskis, and that the matter be referred to a master in chancery; that hearings before

the Czajkowskis and the other defendants who had been served with summons but had failed to appear in the proceedings, and also for a variance of the foregoing process due to the facts, to a master in chancery. Defendants having failed to appear, they were accordingly defaulted by order of the court entered on that day, and the cause was referred generally to a master in chancery as requested.

Thereafter, February 19, 1941, attorney for the principal defendants served notice on plaintiff's counsel, to wit: an order of court, that he would appear before the chancery and ask that the default against the Czajkowskis should be vacated, he vacated and the suit dismissed. This action was continued for five days for the purpose of allowing defendants' attorney to present a petition, and February 25, 1941 he renewed his motion to vacate the default, vacate the alias summons and return of the sheriff, and to dismiss the suit as to the Czajkowskis under their limited appearance. The petition on affidavit of . . . Lake, attorney for the principal defendants, alleged in substance that the foregoing proceeding had been filed December 16, 1938; that summons was duly issued but was never served on any of the defendants; that no return was made thereon by the sheriff; that the summons was then in the files bearing an endorsement by plaintiff's attorney that it had not been served; that on December 3, 1940 an alias summons, on order of court, was issued against the Czajkowskis and duly served; that thereafter, December 31, 1940, they filed a special and limited appearance with affidavit attached for the purpose of objecting to the jurisdiction of the court; that thereafter, January 30, 1941, a notice was served upon Victor G. Land, attorney for George Dohse, but not upon the principal defendants or their attorney, asking that a default be entered against the Czajkowskis, and that the latter be referred to a master in chancery; that nothing before

the master with respect to the foreclosure proceedings followed, and the first notice the Czajkowski had that any hearings were being had was February 18, 1941, when a copy of the master's report was served upon Albert E. Lake, their counsel, who immediately served notice upon plaintiff's attorneys that he would bring the matter before the chancellor for the purpose of settling the jurisdictional question under the special and limited appearance that had theretofore been filed. Plaintiff answered Lake's affidavit or petition and May 15, 1941, the chancellor entered an order denying the motion of Ludwik and Antonina Czajkowski to quash the alias summons and dismiss the suit, at the same time giving them leave to file their answers within fifteen days, without prejudice to the order of reference theretofore entered. No answers were filed by defendants, and June 4, 1941 plaintiff's counsel served notice and secured an order of default against the Czajkowskis for their failure to answer within the time fixed by the order of May 15, and the master was at the same time ordered to proceed with the hearing and determination of the foreclosure proceeding without further delay. After the hearing was concluded, the master filed his report, and June 30, 1941 the decree from which this appeal was taken, was entered in pursuance of the master's findings and recommendations.

As the principal ground for reversal it is urged that since the sheriff made no return on the original summons, the court was not warranted in ordering that an alias summons issue, and under the special appearance filed by defendants they were entitled to have the summons quashed and the suit dismissed. In support of this contention defendants rely on Daly v. City of Chicago, 295 Ill. 276, (opinion filed in 1920), holding that under section 4 of the old Practice Act, where plaintiff, after filing a praecipe and securing a summons, keeps the summons for more than four years without delivering

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the master with respect to the foreclosures proceedings followed, and the first notice the Czapkowski had of any hearings was that had was February 18, 1941, when a copy of the master's report was served upon Albert F. Leko, their counsel, who immediately served notice upon plaintiff's attorneys that he would bring the matter before the chancellor for the purpose of settling the jurisdictional question under the special and limited appearance that had theretofore been filed. Plaintiff answered Leko's affidavit on petition and May 12, 1941, the chancellor entered an order denying the motion of Ludwik and Antonina Czapkowski to quash the alias summons and dismiss the suit, at the same time giving them leave to file their answers within fifteen days, without prejudice to the order of references theretofore entered. No answers were filed by defendants, and June 4, 1941 plaintiff's counsel served notice and secured an order of default against the Czapkowski for their failure to answer within the time fixed by the order of May 12, and the master was at the same time ordered to proceed with the hearing and determination of the foreclosures proceeding without further delay. After the hearing was concluded, the master filed his report, and June 30, 1941 the decree from which this appeal was taken, was entered in pursuance of the master's findings and recommendations.

As the principal ground for reversal it is urged that since the sheriff made no return on the original summons, the court was not warranted in ordering that an alias summons issue, and under the special appearance filed by defendants they were entitled to have the summons quashed and the suit dismissed. In support of this contention defendants rely on Daly v. City of Chicago, 29 Ill. 270, (opinion filed in 1920), holding that under section 4 of the old Practice Act, where plaintiff, after filing a process and securing summons, keeps the summons for more than four years without delivering

it to the sheriff to be served, the court is not authorized to issue an alias summons without satisfactory explanation of the delay, and if issued it may be quashed on motion under a limited appearance. In that case no notice of the pendency of the suit had been served on the city and no effort whatever had been made to obtain service on the municipality. In commenting on this state of facts, the court observed that no authority bearing directly on the question under consideration had been cited, "but the mere statement of the question, it seems to us, presents a situation that should not be tolerated," and stated the reason for its conclusion as follows: "To permit a plaintiff who begins a suit to himself take possession of the summons and keep it substantially four and a half years, presumptively for the purpose of preventing the defendant from getting knowledge of the suit until such time as it suits the plaintiff's purpose for him to know it, seems to us palpably wrong and should not be permitted." The factual situation in the Daly case presented entirely different circumstances from the case at bar. Here defendants knew as early as December 16, 1938 that a foreclosure proceeding had been instituted. They were then served with a notice for a temporary restraining order predicated upon alleged waste of the property sought to be foreclosed. The reason assigned for the court's holding in the Daly case is not applicable to the situation of which defendants complain. Moreover, Rule 5 of the Rules of Practice and Procedure, adopted by the Supreme Court of Illinois August 1, 1938, as applicable to the Civil Practice Act, which became effective in 1934 and superseded the old act, provides that "(1) Whenever it shall appear from the return or affidavit of service, that a writ has not been served, the clerk shall issue successive alias writs, on the request of the plaintiff. The court may order the issuance of alias writs. (2) Where the plaintiff fails to show reasonable diligence to

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it to the sheriff to be served, the court is not warranted in
issuing an alias summons without necessity and without delay,
delay, and it issued it may be stated on motion that a writ of
appearance. In that case no notice of the pendency of the suit
had been served on the city and no effort had been made
to obtain service on the municipality. In compliance of this writ
of facts, the court observed that no attempt had been made to
the question under consideration had been cited, "and the mere
statement of the question, I want to say, presents a situation
that should not be tolerated," and stated the reason for its con-
clusion as follows: "We permit a plaintiff who begins a suit to
himself take possession of the property and keep it indefinitely
four and a half years, presumptively for the purpose of preventing the
defendant from getting possession of the property and then as it
suits the plaintiff's purpose for him to know it, seems to us un-
fairly wrong and should not be permitted." The fact that a writ in
the Dix case presented entirely different circumstances from the
case at bar. Here defendants were as early as October 1st, 1913
that a foreclosure proceeding had been instituted. They were then
served with a notice for a temporary restraining order prohibiting
upon alleged waste of the property sought to be foreclosed. The
reason assigned for the court's holding in the Dix case is not
applicable to the situation of which defendants complain. How-
ever, Rule 5 of the Rules of Practice and Procedure, adopted by
the Supreme Court of Illinois March 1, 1908, is applicable to the
Civil Practice Act, which became effective in 1904 and superseded
the old act, provides that (1) "However it shall appear from the
return on affidavit of service, that a writ has not been served,
the clerk shall issue successive alias writs, on the request of
the plaintiff. The court may order the issuance of alias writs
(2) where the plaintiff fails to show responsibility sufficient to

obtain service through the issuance of alias writs, the action may be dismissed on the application of any defendant or on the court's own motion." Under this rule and in view of the affidavit filed by plaintiff's counsel showing that the delay in obtaining service under the original writ had been caused by negotiation of the parties for settlement of the case, the court was warranted in ordering the alias summons to issue. Paragraph 2 of the rule afforded defendants an opportunity to move for a dismissal of the suit if they were able to show that plaintiff had not used reasonable diligence to obtain service through issuance of the alias summons. Obviously, in view of the circumstances indicated by the record, no such showing could be made. Nothing in the Civil Practice Act or the rules applicable thereto has been called to our attention which would justify defendants in waiting until defaults had been entered against them, both for failure to appear and for failure to answer, after they had been given an opportunity to answer, and then for the first time moving to quash the summons under their limited appearance on the ground that the court had no jurisdiction to enter the decree.

It is urged by defendants that plaintiff was not entitled to an alias summons because he was not diligent in keeping the original summons alive. From the record submitted it is undenied that efforts to settle the case were made from time to time and continued after the order of June 7, 1940 was entered. We are justified in assuming that these circumstances afford a satisfactory explanation of the delay which ensued between the filing of the complaint and service on defendants by summons on December 6, 1940.

Additional circumstances of record invite close scrutiny. After default had been entered against defendants for failure to appear, the cause was referred to a master, and thereafter defendants were again defaulted for failure to file an answer. The order

obtain service through the issuance of alias writs, the motion may be dismissed on the application of any defendant or on the court's own motion." Under this rule and in view of the affidavit filed by plaintiff's counsel showing that the delay in obtaining service under the original writ had been caused by negligence of the parties for settlement of the case, the court was warranted in ordering the alias summons to issue. Paragraph 9 of the rule afforded defendants an opportunity to move for a dismissal of the suit if they were able to show that plaintiff had not used reasonable diligence to obtain service through issuance of the alias summons. Obviously, in view of the circumstances indicated by the record, no such showing could be made. Nothing in the Civil Practice Act or the rules applicable thereto has been held to require attention which would justify defendants in seeking writs of default had been entered against them, both for failure to appear and for failure to answer, after they had been given an opportunity to answer, and then for the first time moving to quash the summons under their limited appearance in the ground that the court had no jurisdiction to enter the decree.

It is urged by defendants that plaintiff was not entitled to an alias summons because he was not diligent in locating the original summons alive. From the record submitted it is undisputed that efforts to settle the case were made from time to time and continued after the order of June 9, 1942 was entered. The court is justified in assuming that these circumstances reflect a conscientious explanation of the delay which occurred between the filing of the complaint and service on defendants by summons on September 3, 1944.

Additional circumstances of record invite close scrutiny. After default had been entered against defendant for failure to appear, the cause was referred to a master, and thereafter defendants were again defaulted for failure to file an answer. The court

of default gave them an opportunity to file their reply within fifteen days, without prejudice to the reference, but they failed or refused to avail themselves of this opportunity to come into the proceeding and present any defense that they might have had. There is no suggestion anywhere in defendants' brief that they have a meritorious defense to the foreclosure proceeding. They stand upon the contention that the court had no jurisdiction of the parties, for the reasons heretofore indicated. Under the circumstances disclosed by the record, we think their position is untenable. The court had jurisdiction by personal service of summons upon them, and the decree was entered upon allegations of fact and proof adduced before the master which are undenied. Defendants say that they were unaware of the proceedings before the master until a copy of the master's report was served upon them. It may reasonably be assumed, however, that they must have known that the cause had been referred to a master for hearing, because they knew of the pendency of the suit and had access to the files which would have apprised them of the order which provided for the filing of an answer without prejudice to the reference. Having allowed themselves to be defaulted, both for failure to appear and answer, they are not in a position to complain because further notice of the proceedings before the master was not served upon them.

Lastly defendants argue that an item of \$300 awarded plaintiff as solicitor's fees in prosecuting the hearing before the master for a permanent injunction, and another item of \$400 solicitor's fees for bringing the foreclosure to decree, are excessive. Defendants have not presented any report of proceedings, and in the absence of such report we must assume that the court heard proper evidence to sustain the allowance of fees under the provisions of the trust deed. There is nothing before us from which we could determine otherwise, and the decree finds that the fees awarded are reason-

of a fault gave them an opportunity to file their reply within fifteen days, without prejudice to the response, but they failed or refused to avail themselves of this opportunity to come into the proceeding and present any defense that they might have had. There is no suggestion anywhere in defendant's brief that they have a meritorious defense to the foreclosure proceeding. They stand upon the contention that the court had no jurisdiction of the parties, for the reasons heretofore indicated. Under the circumstances disclosed by the record, we think their position is untenable. The court had jurisdiction by personal service of summons upon them, and the decree was entered upon allegations of fact and proof advanced before the master which are undisputed. Defendants say that they were unaware of the proceedings before the master until a copy of the master's report was served upon them. It may reasonably be assumed, however, that they must have known that the cause had been referred to a master for hearing, because they knew of the pendency of the suit and had access to the files which would have apprised them of the order which provided for the filing of an answer without prejudice to the response. Having allowed themselves to be defaulted, both for failure to appear and answer, they are not in a position to complain because further notice of the proceedings before the master was not served upon them. Lastly defendants argue that an item of \$500 should be paid off as solicitor's fees in prosecuting the hearing before the master for a permanent injunction, and another item of \$400 solicitor's fees for bringing the foreclosure to decree, the respective. Defendants have not presented any report of proceedings, and in the absence of such report we must assume that the court heard proper evidence to sustain the allowance of fees when the provisions of the statute are read. There is nothing before us from which we could determine otherwise, and the decree stands as the first entered and remains

able.

A motion for dismissal of the appeal was reserved to hearing and is now denied.

In view of our conclusions as heretofore set forth, we are of opinion that the decree was properly entered, and it is therefore affirmed.

DECREE AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

able.

A motion for dismissal of the appeal was reserved to

hearing and is now denied.

In view of our conclusions as respects the facts,
we are of opinion that the decree was properly entered, and
it is therefore affirmed.

THOMAS J. MURPHY.

Scammon, F. J., and Sullivan, J., concur.

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LEONIDAS C. KYLAIVOS,
Appellant,

v.

TOM POLICHRONES and FLOYD LIMBOS,
doing business as Champlain Res-
taurant and Tap Room et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff's face was severely cut and injured as the result of being struck by broken glass from a swinging door leading into the restaurant owned and operated by defendants. His suit for damages in the Superior court resulted in judgment entered on a directed verdict in favor of defendants. This appeal is prosecuted from an order denying his motion to file an amended complaint before trial, from an order denying his petition and motion for a change of venue, from the court's refusal to grant him a new trial, and from the judgment entered on the directed verdict.

The complaint alleged that December 27, 1937 defendants were owners, operators and managers of premises known as Champlain Building, at 54 East Monroe street, Chicago, where they conducted a restaurant and tap room; that plaintiff, while in the exercise of due care and diligence for his own safety, attempted to enter the premises as a patron of the restaurant on the aforementioned date; that the vestibule door on the premises, "being constructed of defective and damaged glass and without any handle bar across the width of the said glass door to serve as a warning to patrons of said restaurant, collapsed and broke suddenly, cutting and injuring plaintiff severely;" that defendants knew of the unsafe and dangerous condition of the vestibule glass door, or, by the exercise of ordinary care, should have known thereof, and it therefore became and was their duty to repair and alter said door

LEONIDAS C. KYIAVOZ,
Appellant,

v.

TOM POLICHEROS and FLOYD LINDOS,
doing business as Champion Restaurant and Tap Room et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FRINK DELIVERED THE OPINION OF THE COURT.

Plaintiff's face was severely cut and injured as the result of being struck by broken glass from a swinging door leading into the restaurant owned and operated by defendants. His suit for damages in the Superior Court resulted in judgment entered on a directed verdict in favor of defendants. This appeal is prosecuted from an order denying his motion to file an amended complaint before trial, from an order denying his petition and motion for a change of venue, from the court's refusal to grant him a new trial, and from the judgment entered on the directed verdict.

The complaint alleged that December 27, 1937 defendants were owners, operators and managers of premises known as Champion Building, at 54 East Monroe Street, Chicago, where they conducted a restaurant and tap room; that plaintiff, while in the exercise of due care and diligence for his own safety, attempted to enter the premises as a patron of the restaurant on the aforementioned date; that the vestibule door on the premises, "being constructed of defective and damaged glass and without any handle bar across the width of the said glass door to serve as a warning to patrons of said restaurant, collapsed and broke suddenly, cutting and injuring plaintiff severely;" that defendants knew of the unsafe and dangerous condition of the vestibule glass door, or, by the exercise of ordinary care, should have known thereof, and it therefore became and was their duty to repair and after said door

so as to keep it in a safe condition and thereby prevent injury to plaintiff and other patrons entering the premises, but that, wholly disregarding their duty, defendants failed and neglected to keep the said glass door in a proper and safe condition, and also neglected and refused to keep the vestibule at the entrance to the premises properly lighted so as to prevent injury to their patrons; that as a result of the collapse and breaking of the vestibule glass door, plaintiff was severely cut, bruised and wounded.

Defendants' answer was a categorical denial of all the essential allegations of the complaint, including a denial that plaintiff was injured and damaged as alleged by him.

The facts disclose that defendants operated a restaurant and tap room at 54 East Monroe street, Chicago, and it was conceded on trial that they were responsible for the upkeep, maintenance and repair of the premises. At about noon December 27, 1937 plaintiff entered defendants' place of business. There were two doors outside of the restaurant which led from the sidewalk into a vestibule about five feet square. To the right of the vestibule a revolving door led to the tap room. To the left a large plate glass swinging door led to the restaurant. The day in question was admittedly cloudy and the vestibule was not lighted at the time plaintiff entered. The evidence as to what occurred after plaintiff had proceeded through the doors leading into the vestibule is extremely scant. Plaintiff testified: "I walked into the entrance way and I opened the door and the only thing I know was the breaking glass was falling all around me and then blood was streaming from my nose. Well, then I looked around to see what was happening and a man approached me and said I had better go and see a doctor. *** I was bleeding profusely and Mr. Polichrones [defendant] brought me a napkin and I was using

so as to keep it in a safe condition and thereby prevent injury to plaintiff and other patrons entering the premises, but that, wholly disregarding their duty, defendants failed and neglected to keep the said glass door in a proper and safe condition, and also neglected and refused to keep the vestibule at the entrance to the premises properly lighted so as to prevent injury to their patrons; that as a result of the collapse and breaking of the vestibule glass door, plaintiff was severely and, bruised and wounded.

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The facts disclose that defendants operated a restaurant and tap room at 54 East Monroe Street, Chicago, and it was conceded on trial that they were responsible for the upkeep, maintenance and repair of the premises. At about noon December 27,

1937 plaintiff entered defendants' place of business. There were two doors outside of the restaurant which led from the sidewalk into a vestibule about five feet square. To the right of

the vestibule a revolving door led to the tap room. To the left a large plate glass swinging door led to the restaurant. The day in question was admittedly cloudy and the vestibule was not lighted at the time plaintiff entered. The evidence as to what occurred

after plaintiff had proceeded through the doors leading into the vestibule is extremely scant. Plaintiff testified: "I walked

into the entrance way and I opened the door and the only thing I know was the breaking glass was falling all around me and then blood was streaming from my nose. Well, then I looked around to see what was happening and a man approached me and said I had

better go and see a doctor. *** I was bleeding profusely and Mr. Policarones [defendant] brought me a napkin and I was using

my handkerchief. I applied that on my nose *** and he took me to the hospital. We went to the doctor's office first, but they said he was at the hospital, so we went out there and the attending doctor at the hospital dressed my nose." About ten stitches were taken in plaintiff's nose and his injury cannot be seriously questioned. Plaintiff testified that there was no bar on the door or handles to push or pull; that the "place was dark. I looked around to see if there was any light, and I saw that there was a light in the ceiling, but it was not lit;" that it was a winter day and rather cloudy. Plaintiff had known defendant Tom Polichrones for many years, had been selling cigarettes to his restaurant for a considerable time, and had frequently entered his restaurant both as a patron and in a business capacity. On the day in question he was about to enter the restaurant for his luncheon. On cross-examination plaintiff reiterated: "The only thing I remember was when I got in I noticed the glass falling," and two or three times he emphatically said that he did not bump into the glass or the door or contact the door before he was injured. There is nothing in the evidence to indicate that plaintiff was guilty of contributory negligence.

Polichrones, testifying on his own behalf, said that shortly before noon on the day of the accident "I hear glass in the door breaking. I run over and Mr. Kylavos was holding a handkerchief on his nose. I asked him what happened, and he said, 'I hit my nose, I cut my nose.' I said, 'Let's go to your doctor.' *** so we took a taxi to the Lakeside Hospital at 29th and Prairie and the doctor had just left there. The interne put some tape on his nose, and then we took another taxi back to the Maller Building. He said, 'Go on back and take care of your business, I can go up myself.' A half hour later he came back to 54 E. Monroe and ate lunch. I asked him what happened and he said the doctor

my handkerchief. I applied that on my nose *** and he took me to the hospital. We went to the doctor's office first, but they said he was at the hospital, so we went out there and the attending doctor at the hospital dressed my nose. About ten stitches were taken in Plaintiff's nose and his injury caused be seriously questioned. Plaintiff testified that there was no bar on the door or handles to push or pull; that the "place" was dark. I looked around to see if there was any light, and I saw that there was a light in the ceiling, but it was not lit; that it was a winter day and rather cloudy. Plaintiff had known defendant Tom Policarpus for many years, had been selling cigarettes to his restaurant for a considerable time, and had frequently entered his restaurant both as a patron and in a business capacity. On the day in question he was there to enter the restaurant for his luncheon. On cross-examination Plaintiff reiterated: "The only thing I remember was that I got in I noticed the glass falling," and two or three times he emphatically said that he did not jump into the glass of the door or contact the door before he was injured. There is nothing in the evidence to indicate that Plaintiff was guilty of contributory negligence. Policarpus, testifying on his own behalf, said that shortly before noon on the day of the accident "I hear glass in the door breaking. I run over and Mr. Sylvos was holding a handkerchief on his nose. I asked him what happened, and he said, 'I hit my nose, I cut my nose.' I said, 'Let's go to your doctor.' *** so we took a taxi to the Lakeside Hospital at 9th and Franklin and the doctor had just left there. The interns put some tape on his nose, and then we took another taxi back to the Bellvue Hotel. He said, 'Go on back and take care of your business, I am going myself.' A half hour later he came back to 54 E. Monroe and ate lunch. I asked him what happened and he said the doctor

put some stitches in his nose and put tape on it." Polichrones further testified that the glass in the swinging door leading into his place of business was broken. "There was one hole broken, not the whole glass." It further appears from Polichrones' testimony that the door in question was installed in July 1937 and the restaurant was opened in September of that year.

Upon this state of facts the court directed a verdict in favor of defendants and judgment was entered accordingly. The only ground urged in support of the court's directed verdict and judgment is that plaintiff failed to prove defendants guilty of negligence and also failed to show his own freedom from contributory negligence. Although neither of the parties suggest application of the doctrine of res ipsa loquitur, we think that under the evidence and pleadings, the doctrine is applicable to the circumstances of this case.

The rule of res ipsa loquitur, based on the expression in an early English case which has been widely quoted with approval (Scott v. London etc. Docks Co., 3 H. & C. 596, 159 Reprint 665), is that where the thing which caused the injury complained of is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation of defendant, that the accident arose from want of care. This statement of the rule has been in substance most frequently adopted and applied in subsequent decisions in the various states, so that the occurrence of an injury under the circumstances therein set forth raises a presumption or permits an inference that the party charged was guilty of negligence. Thus it has been held in conformity with the usual application of the doctrine that where a thing happens which would not ordinarily have occurred if due care

put some stitches in his nose and put tape on it." Policemen further testified that the glass in the swinging door leading into his place of business was broken. "There was one hole broken, not the whole glass." It further appears from Policemen's testimony that the door in question was installed in July 1937 and the restaurant was opened in September of that year.

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had been used, the fact of such happening raises a presumption of negligence. 45 Corpus Juris 1193 and 1196, note 59, and cases cited therein.

The reasons for the rule, as frequently stated, are that the whole body of evidence may be such that no particular negligence can be found, and yet the accident may indicate some negligence, the details of which cannot be ascertained, and the result of its application is that the plaintiff is not required to show particularly what the specific act of negligence was which produced the accident, but is only required in some circumstances to show that the accident is one which would ordinarily not occur had due care been employed. 45 Corpus Juris 1197, note 68b.

The doctrine of res ipsa loquitur has in numerous cases been applied to the falling of objects generally. Thus in Britton v. St. Louis Transfer Co., 155 Ill. App. 317, it was applied to the falling of furniture from a passing wagon; in Connolly v. Des Moines Invest. Co., 130 Iowa 633, 105 N. W. 400, to the falling of a cast-iron window cap; in Lowner v. N. Y. etc. R. Co., 175 Mass. 166, 555 N. E. 805, it was applied to the falling of a pail of sand; in Polony v. James Brady's Sons' Co., (N. J. Sup. 126 A. 675, it was applied to the falling of the boom of a hoisting apparatus; in Poth v. Dexter Horton Estate, 140 Wash. 272, 248 P. 374, it was applied to the roller of a window shade; in Armour v. Golkowska, 95 Ill. App. 492 (affirmed 202 Ill. 144), it was applied to the falling of an empty barrel from a platform; and in Jones v. Riverside Bridge Co., 70 W. Va. 374, 73 S. E. 942, it was applied to the falling of a board from a building under construction. Numerous other instances of the application of the doctrine are cited in 45 Corpus Juris 1201, note 21c.

Under the rule generally applied, there are several conditions, aside from those directly pertaining to the nature and

had been used, the fact of such improper use is a presumption of negligence. 45 Corpus Juris 119, and 119c, note 3, and cases cited therein.

The reasons for the rule, as frequently stated, are that the whole body of evidence may be such that no particular negligence can be found, and yet the accident may indicate some negligence, the details of which cannot be ascertained, and the result of its application is that the plaintiff is not required to show particularly what the specific act of negligence was which produced the accident, but is only required in some circumstances to show that the accident is one which would ordinarily not occur had the care been employed. 45 Corpus Juris 119, note 68b.

The doctrine of res ipsa loquitur has in numerous cases been applied to the falling of objects generally. Thus in Britton v. St. Louis Transfer Co., 175 Ill. App. 217, it was applied to the falling of furniture from a passing wagon; in Connolly v. Des Moines Invest. Co., 130 Iowa 635, 185 N. W. 400, to the falling of a cast-iron window cap; in McIntyre v. N. W. State R. Co., 175 Mass. 166, 575 N. W. 807, it was applied to the falling of a ball of sand; in Polony v. James Brady's Sons, Co., (S. C. 1907), 126 A. 675, it was applied to the falling of the boom of a hoisting apparatus; in Poth v. Dexter Lumber Co., 140 Wash. 273, 248 P. 374, it was applied to the falling of a window shade; in Wright v. Golikowsky, 95 Ill. App. 492 (affirmed 202 Ill. 144), it was applied to the falling of an empty barrel from a platform; and in Jones v. Riverside Bridge Co., 70 N. W. 374, 73 N. W. 944, it was applied to the falling of a board from a building under construction. Numerous other instances of the application of the doctrine are cited in 45 Corpus Juris 1203, note 61c. Under the rule generally applied, there are several exceptions, aside from those directly pertaining to the nature and

happening of the accident or injury as such, which are recognized as essential to make the doctrine applicable in a given case and to lay the foundation for the presumption arising therefrom. Thus, in addition to the proof of an injury sustained under circumstances of such an unusual nature as to imply a breach of duty on the part of the party charged, as required by the statements of the rule, the negligence upon which the action is based must be so alleged as not to preclude reliance on the doctrine because of the rules of pleadings and proof prevailing in the particular jurisdiction. Furthermore, the application of the doctrine is predicated upon the superior knowledge of defendant as to the cause of the injury under the particular circumstances involved and the failure on the part of defendant to explain, and in this connection it may be noted that the applicability or operation of the doctrine is sometimes terminated by the presence or availability of direct evidence upon the issue.

The reason or theory of the doctrine of res ipsa loquitur is based in part upon the consideration that, as the management and control of the agency which produced the injury is, under the circumstances to which the doctrine applies, exclusively vested in defendant, plaintiff is not in a position to show the particular circumstances which caused the offending instrumentality to operate to his injury, while defendant, being more favorably situated, possesses the superior knowledge or means of information as to the cause of the accident and should, therefore, be required to produce the evidence in explanation. 45 Corpus Juris 1204, 1205. The doctrine, although it provides a substitute for direct proof of negligence where plaintiff is unable to point out the specific act of negligence which caused his injury, is a rule of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available,

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and accordingly it has been held that the rule not only does not relieve plaintiff from adducing any evidence within his power but that, unless plaintiff has presented all the testimony reasonably within his power, he can derive no benefit from the doctrine. The decisions are generally in accord in holding that in order for the doctrine to apply it must appear that the injured person was in a place where he had a right to be, and the liability of defendant must be predicated upon the breach of a legal duty to use care.

The presumption or inference of negligence arising by virtue of the doctrine of res ipsa loquitur is not conclusive of the question, but may be overcome by any appropriate evidence, and where the circumstances of the particular case are such that the doctrine is applicable, it operates to establish a prima facie case for plaintiff which, if unexplained, carries the question of negligence to the jury as sufficient to warrant a finding of negligence and support a recovery based thereon. The general rule, broadly stated, is that where plaintiff has established a presumptive or prima facie case of negligence by virtue of the doctrine, it is then incumbent upon defendant, if he wishes to avoid the effect of the doctrine, to introduce evidence to explain, rebut or otherwise overcome the presumption or inference that the injury complained of was due to negligence on his part, and in cases where the res ipsa loquitur doctrine is applied the burden of proof is not thereby shifted, but continues with the party maintaining the affirmative of the issue, although the adverse party may be required to produce proof to rebut the presumption of negligence. Ferrier v. Chicago Rys. Co., 185 Ill. App. 326; Everett v. Foley, 132 Ill. App. 438.

The evidence in the case at bar affords no explanation of the cause for the falling of glass from the swinging door on defendants' premises on plaintiff's person. His testimony,

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the res ipsa loquitor doctrine is applied the burden of proof is

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affirmative of the issue, although the adverse party may be

required to produce proof to rebut the presumption of negligence.

Fetter v. Chicago Ry. Co., 182 Ill. App. 356; Ex parte v. Foley,

132 Ill. App. 438.

The evidence in the case at bar affords no explanation of

the cause for the falling of glass from the swinging door on

defendant's premises or plaintiff's person. His testimony

and indeed the only testimony of record, is to the effect that when he walked into the entrance and opened the door "the only thing I know was the breaking glass was falling all around me and then blood was streaming from my nose." As heretofore indicated, plaintiff said several times that he did not bump into the door or have any contact with it before the accident. Defendants offered no explanation to rebut the presumption of negligence established by the evidence. Since it is conceded that defendants were responsible for the maintenance and repair of the premises and that plaintiff had the right to enter the restaurant as a patron, with the consequent duty on defendants to keep the door in a safe condition and prevent injury to those entering the premises, the evidence adduced by plaintiff was sufficient, under the allegations of the complaint, to raise the presumption of negligence and require some explanation on the part of defendants, if such could be adduced by competent proof, to rebut or overcome this presumption. Under the circumstances it was a question for the jury, under proper instructions of the court, to determine whether defendants were liable, and consequently we think it was error for the court to take the case away from the jury and direct a verdict.

Since the cause will in all probability be retried, we comment briefly on two other grounds urged for reversal. Immediately preceding the beginning of the trial plaintiff asked leave to amend his complaint by specifically pleading section 69-29 of the Municipal Code, which provides that "Swinging doors shall have floor stops or other devices to prevent such doors from swinging through an arc of more than ninety degrees." Although, under chap. 110, sec. 170, Ill. Rev. Statutes, 1941, courts should be liberal in allowing amendments, especially before trial, there is nothing in the record to suggest that plaintiff was injured by reason of defendants' failure to observe the provisions of the code

and indeed the only testimony of record, is to the effect that when he walked into the entrance and opened the door "the only thing I know was the breaking glass was falling all around me and then blood was streaming from my nose." As respondents

indicated, Plaintiff said several times that he did not jump into the door or have any contact with it before the accident.

Defendants offered no explanation to rebut the presumption of negligence established by the evidence. Hence it is concluded

that defendants were responsible for the maintenance and repair

of the premises and that Plaintiff had the right to enter the

restaurant as a patron, with the consent duty on defendants

to keep the door in a safe condition and prevent injury to those

entering the premises, the evidence advanced by Plaintiff was sufficient

to raise the presumption of negligence and require some explanation on the part

of defendants, it such could be adduced by competent proof, to

rebut or overcome this presumption. Under the circumstances it

was a question for the jury, and a proper instruction of the court

to determine whether defendants were liable, and consequently to

think it was error for the court to take the case away from the

jury and direct a verdict.

Since the cause will in all probability be retried, we

comment briefly on two other grounds urged for reversal. Immediately

preceding the beginning of the trial Plaintiff asked leave to amend

his complaint by specifically pleading section 89-29 of the Municipal

Code, which provides that "Swinging doors shall have floor stops or

other devices to prevent such doors from swinging through an arc of

more than ninety degrees." Although, under chap. 110, sec. 110,

Ill. Rev. Statutes, 1941, courts should be liberal in allowing

amendments, especially before trial, there is nothing in the

record to suggest that Plaintiff was injured by reason of

with respect to swinging doors, and therefore the allowance of the amendment would not have aided plaintiff's case.

The principal other ground urged for reversal is that the court denied a motion for change of venue. This motion was presented after the case was called for trial and after numerous continuances had been granted. The cause had been pending for many months and plaintiff's motion was not made in apt time. The trial judge was within his rights in denying the motion.

For the reasons indicated the judgment of the Superior court is reversed and the cause remanded for retrial.

JUDGMENT REVERSED AND
CAUSE REMANDED FOR RETRIAL.

Sullivan, P. J., and Scanlan, J., concur.

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JUDGMENT REVERSED AND
CAUSE REMANDED FOR RETRIAL.

Sullivan, P. J., and Scannlan, J., concur.

42194

316 I.A. 445

ARMIN F. HILLMER, as representative
of all Creditors of Chicago Bank of
Commerce,

Appellant,

v.

HARLEY L. CLARKE,

Appellee.

CHICAGO BANK OF COMMERCE et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff prosecuted a direct appeal to the Supreme court of Illinois from an order of the Superior court of Cook county entered October 22, 1940 discharging Harley L. Clarke, a stockholder of the Chicago Bank of Commerce, from liability under a decree in the amount of \$276,621.44, upon payment of \$5,000, and also from an order of January 16, 1941 directing J. A. Whalen, receiver, to accept the settlement sum in cash tendered by Clarke under the order of October 22, 1940 and to issue forthwith a satisfaction piece. The appeal, argued under four separate points set forth in plaintiff's brief, challenged the constitutionality of the provision of the Banking Act (sec. 11, ch. 16-1/2, Ill. Rev. Stat. 1939) authorizing the discharge of insolvent stockholders, and involved a construction of sec. 6 of Article XI of the Illinois constitution. Pending the determination of the cause in the Supreme court Clarke moved to dismiss the appeal. The court took the motion with the cause, and subsequently in an opinion filed November 18, 1941 held that it has no jurisdiction to review a case by direct appeal on the ground that a constitutional question is involved unless the record showed affirmatively that the question was presented in some form or other and passed on by the trial court, and the ruling thereon must be one of the things relied upon for reversal of the judgment. The court was

ARMIN T. MILLER, as representative
of all Creditors of Chicago Bank of
Commerce,

Appellant,

v.

HARLEY I. CLARKE,

Appellee.

CHICAGO BANK OF COMMERCE et al.,
Defendants.

ATTORNEY AT LAW
COUNT OF COOK COUNTY,

MR. JUSTICE FRANKLIN DELIVERED THE OPINION OF THE COURT.

Plaintiff prosecuted a direct appeal to the Supreme Court of Illinois from an order of the Superior Court of Cook County entered October 22, 1940 discharging Harley I. Clarke, a stockholder of the Chicago Bank of Commerce, from liability under a decree in the amount of \$270,621.44, upon payment of \$5,000, and also from an order of January 16, 1941 directing J. A. Nathan, receiver, to accept the settlement sum in cash tendered by Clarke under the order of October 22, 1940 and to issue forthwith a satisfaction piece. The appeal, argued under four separate points set forth in plaintiff's brief, challenged the constitutionality of the provision of the Banking Act (sec. 11, ch. 16-1/2, Ill. Rev. Stat. 1939) authorizing the discharge of insolvent stockholders, and involved a construction of sec. 6 of Article II of the Illinois constitution. Pending the determination of the cause in the Supreme Court Clarke moved to dismiss the appeal. The court took the motion with the case, and subsequently in an opinion filed November 17, 1941 held that it had no jurisdiction to review a case by direct appeal on the ground that a constitutional question is involved unless the record shows affirmatively that the question was presented in some form or other and passed on by the trial court, and the ruling thereon must be one of the things relied upon for reversal of the judgment. The court was

of the opinion that Clarke should have moved for transfer of the cause to the Appellate court and not for a dismissal of the appeal; therefore, the motion for dismissal was denied and the cause was transferred to this court. Hillmer v. Chicago Bank of Commerce, 378 Ill. 449.

The only questions argued and the **only** points presented in plaintiff's brief involve the constitutionality of the provision of the Banking Act authorizing the discharge of insolvent stockholders and a construction of sec. 6 of article XI of the Illinois constitution. These questions having been resolved adversely to plaintiff, there remains nothing for us to determine. Plaintiff evidently realized the position in which the opinion of the Supreme court left him, for on petition for rehearing, which was denied by the Supreme court, he made the following statement (p. 3, petition for rehearing): "By transferring this case to the Appellate Court this court is in effect holding that there are no constitutional questions in the case, since the Appellate Court has no jurisdiction to pass upon such questions. The decision of the court amounts to an adverse holding on the constitutional questions raised by appellants."

Clarke's insolvency was the only issue of fact alleged in his petition, and this was conceded by plaintiff. No complaint being made as to the reasonableness of the result reached or the expediency of the policy adopted by the trial court, the orders appealed from should be affirmed, and it is so ordered.

ORDERS AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

of the opinion that Clark should have moved for transfer of the cause to the appellate court and not for a dismissal of the appeal; therefore, the motion for dismissal was denied and the cause was transferred to this court. Sullivan v. Chicago Board of Commerce, 378 Ill. 449.

The only questions argued and the only points presented in plaintiff's brief involve the constitutionality of the provision of the Banking Act authorizing the discharge of insolvent stockholders and a construction of sec. 6 of article XI of the Illinois constitution. These questions having been resolved adversely to plaintiff, there remains nothing for us to determine. Plaintiff evidently realized the position in which the opinion of the supreme court left him, for on petition for rehearing, which was denied by the supreme court, he made the following statement (p. 3, petition for rehearing): "By transferring this case to the appellate court this court is in effect holding that there are no constitutional questions in the case, since the appellate court has no jurisdiction to pass upon such questions. The decision of the court amounts to an adverse holding on the constitutional questions raised by appellants."

Clark's insolvency was the only issue at issue alleged in his petition, and this was conceded by plaintiff. No complaint being made as to the reasonableness of the penalty assessed on the expediency of the policy adopted by the trial court, the entire appeal from should be affirmed, and it is so ordered.

GRANT B. SULLIVAN, P. J., and BENJAMIN J. CONNER,

42213

IN THE MATTER OF CHARLES H. ALBERS,
Receiver of Ridgeway State Bank of
Chicago, a corporation, (B. H.
Molner, Assignee),

v.

WILLIAM D. MARTIN.

RIDGWAY STATE BANK OF CHICAGO, a
corporation (B. H. Molner, Assignee),
Appellee,

v.

WILLIAM D. MARTIN,

Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

316 I.A. 446

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

November 7, 1930 the Ridgeway State Bank of Chicago had judgment against W. D. Martin for \$3,250 and costs, predicated upon a collateral promissory note dated August 21, 1930 and due October 10, 1930 for \$3,000, evidencing a loan in that sum to defendant by the bank. After the entry of judgment execution issued, but service thereof was never had upon defendant. Subsequently Charles H. Albers was appointed receiver of the bank, and September 11, 1940 he filed an affidavit for scire facias to revive the judgment, alleging that after the allowance of all credits and set-offs there remained due and unpaid on said judgment the principal sum of \$2,298.74 with interest at 5 per cent from November 7, 1930. The writ of scire facias issued and summons was personally served on Martin by the sheriff of Cook county to appear before the court in October 1940 to show cause why judgment should not be entered against him and execution issued thereon. Thereafter, October 11, 1940, judgment was entered under the writ of scire facias for the stated amount of \$2,988.74 and execution issued thereon. November 8, 1940 Martin filed his written motion and petition for vacation of the scire facias judgment and for

IN THE MATTER OF CHARLES H. ALBERT,
Receiver of Ridgeway State Bank of
Chicago, a corporation, (B. H.
Molner, Assignee)

v.
WILLIAM D. MARTIN,

RIDGWAY STATE BANK OF CHICAGO, a
corporation (B. H. Molner, Assignee),
Appellee,

v.
WILLIAM D. MARTIN,
Appellant.

COURT OF COOK COUNTY,
APPEAL FROM SUPERIOR

3131A-446

MR. JUSTICE FRIDLYN DELIVERED THE OPINION OF THE COURT.

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judgment against W. D. Martin for \$3,250 and costs, pronounced
upon a collateral promissory note dated August 21, 1930 and due
October 10, 1930 for \$3,000, evidencing a loan in that sum to
defendant by the bank. After the entry of judgment execution
issued, but service thereof was never had upon defendant, and
plaintiff Charles H. Albert was appointed receiver of the bank, and
September 11, 1940 he filed an affidavit for said facias to
revive the judgment, alleging that after the allowance of all
credits and set-offs there remained due and unpaid on said judg-
ment the principal sum of \$3,092.74 with interest at 7 per cent
from November 7, 1930. The writ of scire facias issued and return
was personally served on Martin by the sheriff of Cook county to
appear before the court in October 1940 to show cause why judgment
should not be entered against him and execution issued thereon.
Thereafter, October 11, 1940, judgment was entered under the writ
of scire facias for the stated amount of \$3,092.74 and execution
issued thereon. November 8, 1940 Martin filed his written motion
and petition for vacation of the scire facias judgment and for

leave to appear and defend. June 6, 1941 he had leave to file an amended and supplemental motion and petition to vacate both the original judgment entered November 7, 1930 and the scire facias judgment of October 11, 1940. B. H. Molner, who became the assignee of Charles H. Albers, receiver, answered Martin's amended and supplemental motion and petition, and October 3 of that year, pursuant to hearing, the court entered an order denying Martin's motion and petition in both actions, from which this appeal is taken.

It is urged by Martin's counsel that the order reviving the judgment was entered thirteen days after the service of the writ of scire facias, notwithstanding the provision of the statute giving a defendant twenty days within which to plead after service of summons (Ill. Rev. Stat. 1939, ch. 110, par. 259.8), and that consequently the court lacked jurisdiction of the person of defendant, rendering the judgment void. It appears of record, however, that defendant appeared generally in the proceeding and participated fully in the arguments before the court. In these circumstances he waived any irregularities in service of process under the consistent holding of the authorities in this state. In Brown v. Van Keuren, 340 Ill. 118, it was held that "Where a defendant is in court and attempts to make a defense which can only be sustained by an exercise of jurisdiction the appearance is general, whether it is in terms limited to a special purpose or not. [Citing cases.]" In United States Brewing Co. v. Epp, 247 Ill. App. 315, judgment was entered by confession September 9, 1918, and execution was issued but never served. August 15, 1925 a writ of scire facias was issued to revive the judgment, and September 8 of that year a writ was returned bearing the indorsement of the sheriff that the defendant was not found. September 10, 1925 the court entered an order reciting that the defendant had been served with the writ. It was ordered that the judgment be revived and an execution issue thereon. In March 1926 defendant appeared and moved to

leave to appear and defend. On 3, 1941 he had leave to file an amended and supplementary motion and petition to vacate both the original judgment entered November 7, 1930 and the writ facias judgment of October 11, 1940. B. H. Molner, who became the assignee of Charles H. Albers, receiver, answered Martin's amended and supplementary motion and petition, and October 3 of that year, pursuant to hearing, the court entered an order denying Martin's motion and petition in both actions, from which this appeal is taken.

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vacate the original judgment, submitting his sworn petition in support thereof. That motion was denied. Subsequently in May 1927 defendant filed his motion and supporting affidavit, asking the court to set aside the order of September 10, 1925 reviving the judgment, which motion was continued to May 14, 1927. On that date defendant filed a special and limited appearance by his attorney, and hearing on the motion was continued to June 4, when the court vacated the order of revival. Plaintiff in that case contended that although defendant was not served with process to the scire facias, nevertheless, by his subsequent conduct in moving to vacate the original judgment and by filing his schedules to the executions issued on the revived judgment, he acquiesced therein. The Appellate Court adopted this view, and in reversing the order of June 4, 1927 held that if a party appears to a cause for any purpose whatsoever, except only to object to the process or service, he waives all objections thereto, although there may have been no service, citing Dunning v. Dunning, 37 Ill. 306. The court said that the question before it was not concerned with the original judgment but with the order of revival under the writ of scire facias; that the requirements for service of the writ are "somewhat indefinite in many jurisdictions;" that its professed object is to give warning or notice to the person to be charged thereby and that the "only defenses which can be set up in the scire facias proceeding are that no judgment was rendered, or, if one was rendered, it has been satisfied or discharged;" that "These considerations lead us to the conclusion that the requirements for obtaining jurisdiction of the defendant upon a scire facias to revive a judgment are not necessarily as strict as those required when the original judgment is obtained, and that the defendant, in such a proceeding, may submit himself to jurisdiction by less definite conduct than in the case of an original proceeding, and that any conduct on his

part which indicates submission of himself to the court will be construed to waive any defect or failure in the service of process." In the light of these decisions expressing the rule generally adhered to, we are of opinion that defendant by his general appearance submitted himself to the jurisdiction of the court and thereby waived any statutory irregularities.

The only other question involved is whether the court properly denied Martin's amended and supplemental petition of June 25, 1941. The courts of this state have consistently held that a motion to vacate a judgment is addressed to the sound legal discretion of the court, and in the absence of a clear showing of abuse of such discretion, the order of the court will not be disturbed on appeal. Village of LaGrange Park v. Hess, 332 Ill. 236. By his amended and supplemental petition Martin sought to show that the collateral for the \$3,000 note, upon which the original and revived judgments were predicated, was converted by the Ridgeway State Bank to its own use, and was of sufficient value to extinguish the \$3,000 indebtedness; and it was alleged that the obligors on the collateral had paid more than \$3,000 on their respective indebtedness.

Molner's verified answer denied these allegations, explained the transactions with respect to each item of the collateral in detail, and positively averred that no moneys whatever came into possession of the bank, Charles H. Albers, receiver, or plaintiff as assignee. A careful reading of the answer discloses that every contention presented by Martin in his amended and supplemental petition was fully covered. The court evidently weighed the facts presented by these pleadings, and we think it was justified in concluding upon the whole record that defendant's motion should be denied.

The order of revival of judgment is accordingly affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

part which indicates admission of himself to the court will be construed to waive any defect or failure in the service of process." In the light of these decisions expressing the rule generally adhered to, we are of opinion that defendant by his general appearance submitted himself to the jurisdiction of the court and thereby waived any statutory irregularities.

The only other question involved is whether the court properly denied Martin's amended and supplemental petition of June 25, 1941. The courts of this state have consistently held that a motion to vacate a judgment is addressed to the sound legal discretion of the court, and in the absence of a clear showing of abuse of such discretion, the order of the court will not be disturbed on appeal. Village of Elmhurst v. West, 332 Ill. 130. By his amended and supplemental petition Martin sought to show that the affidavits for the \$3,000 note, upon which the original and revived judgments were predicated, was converted by the Highway Department to its own use, and was of sufficient value to extinguish the \$3,000 indebtedness and it was alleged that the officers of the Highway Department had paid more than \$3,000 on their respective indebtedness.

Martin's verified answer denied these allegations, explained the transactions which gave rise to each item on the statement in detail, and positively averred that no money whatsoever came into possession of the bank, Charles F. Albert, receiver, or otherwise as assignee. A careful review of the answer discloses that every contention presented by Martin in his amended and supplemental petition was fully covered. The court evidently weighed the facts presented by these pleadings, and we think it was justified in concluding upon the whole record that Martin's motion should be denied.

The order of revival of judgment is accordingly affirmed.

JUDGES: Mr. Justice, Mr. Justice, Mr. Justice.

42245

ANTHONY CERAMI,
Appellee,

v.

JOHN M. THOMSON,
Appellant.

316 I.A. 446²

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action at law to recover from defendant, a real estate broker, commissions on unexpired leases to apartments in plaintiff's building, after plaintiff had terminated the management of the building by defendant. Trial by the court resulted in judgment for plaintiff in the sum of \$139.60, from which defendant has taken this appeal.

The facts disclose that Edward M. Coffman, the former owner of a building known as 4362-66 Lake Park avenue, consisting of nine apartments, sold the property to plaintiff in December 1940. Defendant, a licensed real estate broker, with offices in the vicinity of the premises, had for many years managed the building, collected the rents, rendered periodic statements deducting the expenses of management, including his commissions, and submitted the balance of the proceeds to the owner. For this service he received 4 per cent of the gross rentals. After plaintiff acquired the ownership of the building he allowed defendant to continue in the capacity of manager until the fall of 1941, at which time plaintiff terminated the relationship. Defendant then delivered to plaintiff seven leases which he had negotiated with various tenants in the building, for which plaintiff gave him a written receipt, retaining the commissions for which this suit was brought and rendering an account for the balance. Plaintiff's statement of claim alleges that defendant

ANTHONY CERAMI,
Appellee,

v.

JOHN M. THOMSON,
Appellant.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

APPEAL FROM CIRCUIT COURT
OF CHICAGO.

Plaintiff brought an action at law to recover from defendant, a real estate broker, commissions on unexpired leases to apartments in plaintiff's building, after plaintiff had terminated the management of the building by defendant. Trial by the court resulted in judgment for plaintiff in the sum of \$139.60, from which defendant has taken this appeal.

The facts disclose that Edward M. Coffey, the former owner of a building known as 4362-66 Lake Park Avenue, consisting of nine apartments, sold the property to plaintiff in December 1940. Defendant, a licensed real estate broker, with offices in the vicinity of the premises, had for many years managed the building, collected the rents, rendered periodic statements deducting the expenses of management, including his commissions, and submitted the balance of the proceeds to the court. For this service he received 4 per cent of the gross rentals. After plaintiff acquired the ownership of the building he allowed defendant to continue in the capacity of manager until the fall of 1941, at which time plaintiff terminated the relationship. Defendant then delivered to plaintiff seven leases which he had negotiated with various tenants in the building, for which plaintiff gave him a written receipt, retaining the commissions for which this suit was brought and rendering an account for the balance. Plaintiff's statement of claim alleges that defendant

agreed to manage the property and to accept as his full compensation 4 per cent of the rents collected, "it being agreed that the said agreement would be terminable by either party at any time;" and that in accordance with the terms of the agreement defendant was not entitled to commission other than for rents already collected. Counsel agree and the court was of opinion that plaintiff's case failed to establish any such agreement and the question presented is whether defendant was entitled to retain 4 per cent of the rents on unexpired leases after the relationship between the parties was terminated in accordance with the custom and usage of realtors in Chicago. The amount involved was stipulated to be \$139.60.

Upon trial defendant introduced certain provisions of the rules of the Chicago Real Estate Board covering charges made for dwelling-building management, and presented two disinterested witnesses, Louis T. Orr and Tighe E. Woods, from whose testimony it appears without controversy that, in the absence of any agreement, it was the custom and usage of realtors in Chicago to charge commissions for unexpired leases whenever the management arrangement is terminated.

Although plaintiff failed to establish the agreement alleged in his statement of claim, he argues in support of the judgment that even in the absence of a specific agreement the court was justified in finding in his favor, principally upon the ground that there was no proof that plaintiff knew of the alleged custom, and that the evidence failed to disclose that the custom was known and established by persons other than real estate brokers. This contention is untenable because the record discloses that plaintiff was the owner of other buildings in Chicago which were managed by real estate brokers and was undoubtedly familiar with usages and customs of realtors. Moreover, the courts of this state have

agreed to manage the property and to accept as the full compensation 4 per cent of the rents collected, "it being agreed that the said agreement would be terminable by either party at any time;" and that in accordance with the terms of the agreement defendant was not entitled to commission other than for rents already collected. Counsel agree and the court was of opinion that plaintiff's case failed to establish any such agreement and the question presented is whether defendant was entitled to retain 4 per cent of the rents on unexpired leases after the relationship between the parties was terminated in accordance with the custom and usage of realtors in Chicago. The amount involved was stipulated to be \$139.60.

Upon trial defendant introduced certain provisions of the rules of the Chicago Real Estate Board covering charges made for dwelling-building management, and presented two disinterested witnesses, Louis T. Orr and Edgar E. Woods, from whose testimony it appears without controversy that, in the absence of any agreement, it was the custom and usage of realtors in Chicago to charge a commission for unexpired leases whenever the management arrangement is terminated.

Although plaintiff failed to establish the agreement alleged in his statement of claim, he argues in support of the judgment that even in the absence of a specific agreement the court was justified in finding in his favor, principally upon the ground that there was no proof that plaintiff knew of the alleged custom, and that the evidence failed to disclose that the custom was known and established by persons other than real estate brokers. This contention is untenable because the record discloses that plaintiff was the owner of other buildings in Chicago which were managed by real estate brokers and was undoubtedly familiar with usages and customs of realtors. Moreover, the courts of this state have

held that in the absence of specific agreement the law will presume that the parties contracted with reference to the general customs and usages of the business or profession involved. Cooney v. City of Belleville, 311 Ill. App. 553. In Carroll, Schendorf & Boenicke, Inc., v. Simons, 245 Ill. App. 586, Mr. Justice McSurely, speaking for the court, observed: "It is reasonable to assume the existence of some custom in this respect; otherwise, a broker could be deprived of all compensation for his services by the simple act of changing the management of the property. As the evidence showed that there was no contract between the parties with reference to new leases procured by plaintiff in the event of the withdrawal from it of the management of the property, the custom in the real estate business here will obtain."

At the conclusion of the evidence on the first day of the trial, the court was of opinion that defendant was entitled to the commissions in accordance with the general custom and usage. However, the matter was continued on request of plaintiff's counsel for leave to file a brief, and when the hearing was resumed plaintiff produced Coffman, former owner, and he was permitted to testify over defendant's objection as to an alleged agreement that he had made with plaintiff on defendant's behalf. Defendant's counsel contend that this testimony was not binding on defendant, that it constituted hearsay evidence and therefore was not admissible. We think the point is well taken.

Since defendant negotiated the leases and managed the property he was entitled to retain his compensation when the management was terminated. The case was fully tried, and no useful purpose would be served by remanding it. The judgment of the Municipal court is therefore is reversed.

JUDGMENT REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

held that in the absence of specific agreement the law will presume that the parties contracted with reference to the general customs and usages of the business or profession involved. Geogary v. City of Belleville, 311 Ill. App. 553. In Carroll, Defendant v. Honzik, Inc., v. Simon, 245 Ill. App. 586, Mr. Justice McOmber speaking for the court, observed: "It is reasonable to assume the existence of some custom in this respect; otherwise, a broker could be deprived of all compensation for his services by the simple act of changing the management of the property. As the evidence showed that there was no contract between the parties with reference to new leases procured by plaintiff in the event of the withdrawal from it of the management of the property, the custom in the real estate business here will obtain."

At the conclusion of the evidence on the first day of the trial, the court was of opinion that defendant was entitled to the commissions in accordance with the general custom and usage. However, the matter was continued on request of plaintiff's counsel for leave to file a brief, and when the hearing was resumed plaintiff produced Gelfman, former owner, and he was permitted to testify as to defendant's objection as to an alleged agreement that he had made with plaintiff on defendant's behalf. Defendant's counsel contended that this testimony was not binding on defendant, that it constituted hearsay evidence and therefore was not admissible. We think the point is well taken.

Since defendant negotiated the leases and managed the property he was entitled to retain his compensation when the agreement was terminated. The case was fully tried, and no useful purpose would be served by remanding it. The judgment of the Municipal court is therefore reversed.

JUDGMENT REVERSED.

41680

316 I.A. 447'

STELLA McFADDEN,
(Plaintiff)

Appellee,

v.

ROWENA G. CRUMB, WILLIAM A.
PATTON, A. LOUISE PATTON, and
CHICAGO TITLE AND TRUST COMPANY,
as Trustee, etc.,
Defendants.

WILLIAM A. PATTON and A. LOUISE
PATTON (Defendants)
Cross-Plaintiffs,

v.

ROWENA G. CRUMB, THE STATE BANK
OF WOODSTOCK (Woodstock, Illi-
nois), Administrator de bonis
non with the Will annexed of the
Estate of Herbert D. Crumb, De-
ceased, and AVENUE STATE BANK,
Cross-Defendants.

ROWENA G. CRUMB,

Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Stella McFadden brought an action against Rowena G. Crumb, William A. Patton and A. Louise Patton, and The State Bank of Woodstock, administrator with the will annexed of the estate of Herbert D. Crumb, deceased, to foreclose five trust deeds securing five notes of \$2,000 each, signed by the Pattons. A decree of foreclosure and sale was entered and thereafter a deficiency decree was entered against Rowena G. Crumb, alone, for \$11,496.43. She appeals.

The complaint alleges, inter alia, that plaintiff is the legal owner and holder of the five notes and trust deeds executed by the Pattons. In so far as it seeks to charge appellant with personal liability for any deficiency, the only allegations of the complaint are "that plaintiff is informed and believes, and so states the fact to be, that the said Rowena G. Crumb, a widow,

STELLA MCARDER
(Plaintiff)

Appellee,

v.

ROWENA G. GRUMB, WILLIAM A.
PATTON, A. LOUISE PATTON, and
CHICAGO TITLE AND TRUST COMPANY,
as Trustees, etc., etc.,
Defendants.

WILLIAM A. PATTON and A. LOUISE
PATTON (Defendants)
Cross-Plaintiffs,

v.

ROWENA G. GRUMB, THE STATE BANK
OF WOODSTOCK (Woodstock, Ill.,
trustee), Administrator of the
Estate of Herbert D. Grumb, De-
ceased, and AVONUE STATE BANK,
Cross-Defendants.

ROWENA G. GRUMB,
Appellant,

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Stella Mcarder brought an action against Rowena G. Grumb,
William A. Patton and A. Louise Patton, and the State Bank of
Woodstock, Administrator with the will annexed of the estate of
Herbert D. Grumb, deceased, to foreclose five first deeds securing
five notes of \$2,000 each, signed by the Pattons. A decree of
foreclosure and sale was entered and the property sold. A deficiency decree
was entered against Rowena G. Grumb, alone, for \$11,406.43. The
appeals.

The complaint alleges, inter alia, that plaintiff is the
legal owner and holder of the five notes and trust deeds executed
by the Pattons. In so far as it seeks to charge respondent with
personal liability for any deficiency, the only allegations of
the complaint are "that plaintiff is informed and believes, and
so states the fact to be, that the said Rowena G. Grumb, a widow,

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

3153 A. 148

is the record holder of the equity of redemption of said premises; that she assumed and agreed to pay the aforesaid mortgages." In appellant's answer to the complaint, she "denies that she ever assumed or agreed to pay the notes secured by the trust deeds described in the complaint and denies that she ever in any manner, assented or agreed to the condition of a deed relating to the personal assumption by her, of such indebtedness and denies that the deed to the real estate described in the complaint was ever delivered to or, in any manner, accepted by her, and alleges that she has no knowledge of the transaction. * * * denies that she is indebted to the plaintiff or to any other person on account of the notes and trust deeds described in the complaint and denies that plaintiff is entitled to any judgment or other relief against this defendant." A master heard the evidence and made a report to the court. The trial court adopted the findings in the report and decreed, inter alia, "that title to the real estate is vested in the defendant, Rowena G. Crumb; that title was conveyed to Rowena G. Crumb and Herbert D. Crumb, her husband, as joint tenants pursuant to a written contract dated December 12, 1929; that physical delivery of said deed was made to Herbert D. Crumb and that Herbert D. Crumb was authorized to accept said deed by Rowena G. Crumb on her behalf and as her agent; that said deed provides that the conveyance was made subject to the mortgages which the grantees assumed and agreed to pay; that it was the intention of the parties to said contract that the defendants, Rowena G. Crumb and Herbert D. Crumb should assume and agree to pay said mortgages; that the defendant Rowena G. Crumb had knowledge of and assented to the assumption agreement and that she assumed and agreed to pay said mortgages and is personally liable to the plaintiff." The five lots were sold for \$300 each and the deficiency judgment followed.

is the record holder of the equity of redemption of said premises; that she assumed and agreed to pay the foregoing mortgage. In appellant's answer to the complaint, she denies that she ever assumed or agreed to pay the note secured by the trust deed described in the complaint and denies that she ever in any manner, assisted or agreed to the execution of a deed relating to the personal assumption by her, of such indebtedness and denies that the deed to the real estate described in the complaint was ever delivered to or, in any manner, accepted by her, and alleges that she has no knowledge of the transaction. * * * denies that she is indebted to the plaintiff or to any other person on account of the notes and trust deeds described in the complaint and denies that plaintiff is entitled to any judgment or other relief against this defendant. A master heard the evidence and made a report to the court. The trial court accepted the findings in the report and decreed, inter alia, that title to the real estate is vested in the defendant, Rogers D. Crump; that title was conveyed to Rogers D. Crump and Herbert D. Crump, her husband, as joint tenants pursuant to a written contract dated December 12, 1927; that physical delivery of said deed was made to Herbert D. Crump and that Herbert D. Crump was authorized to accept said deed by Rogers D. Crump on her behalf and as her agent; that said deed provides that the conveyance was made subject to the mortgages which the grantors assumed and agreed to pay; that it was the intention of the parties to said contract that the defendants, Rogers D. Crump and Herbert D. Crump should assume and agree to pay said mortgages; that the defendant Rogers D. Crump has knowledge of and assented to the assumption agreement and that she assumed and agreed to pay said mortgages and is personally liable to the plaintiff. The five lots were sold for \$500 each and the deficiency judgment followed.

There is no dispute as to the material facts in the case. Herbert D. Crumb (of Harvard, Illinois), deceased, owned a building at 3110 Wesley avenue, Berwyn, Cook county, Illinois, which was subject to a mortgage of \$7,000. William A. Patton and A. Louise Patton, defendants, of Oak Park, Illinois, owned five vacant lots in Berwyn, each lot being subject to a trust deed of \$2,000. The five notes secured by the trust deeds were held by the Avenue State Bank, of Oak Park, as collateral security to a note executed by the Pattons in the sum of \$7,400. On December 12, 1929, Crumb "and Rowena G. Crumb, his wife," entered into a contract with the Pattons for the exchange of the aforesaid properties. The contract provided that Crumb "and Rowena G. Crumb, his wife," agreed to sell and convey to the Pattons the two-flat building, subject to a first mortgage of \$7,000, and the Pattons agreed to sell and convey to Crumb and his wife the five lots, subject to the five mortgages above described. The contract also contained the following provision: that "said first mortgage held by the Avenue State Bank, Oak Park, Illinois, to secure a collateral loan of Seven Thousand Four Hundred Dollars (\$7,400.00), parties of the first part to release parties of second part from collateral loan." The exchange transaction was closed at the Avenue State Bank on February 25, 1930. Crumb, the Pattons and Mr. Moore M. Peregrine, general counsel for the Bank, were present at the time, but appellant was not present. Crumb delivered to the Pattons a deed in which the grantors are described as Herbert D. Crumb and Rowena G. Crumb, his wife, and which conveyed the Wesley avenue property to the Pattons in joint tenancy, subject to a \$7,000 mortgage. The deed also contained a provision that the grantees assumed and agreed to pay the mortgage. The Pattons delivered to Crumb a deed conveying the five lots in question to Herbert D. Crumb and Rowena G. Crumb, his wife, in joint tenancy,

There is no dispute as to the material facts in the case. Herbert D. Grump (of Harvard, Illinois), deceased, owned a building at 3110 Wesley Avenue, Berwyn, Cook County, Illinois, which was subject to a mortgage of \$7,000. William A. Patton and Louise Patton, defendants, of Oak Park, Illinois, owned five vacant lots in Berwyn, each lot being subject to a trust deed of \$2,000. The five notes secured by the trust deeds were held by the Avenue State Bank, of Oak Park, as collateral security to a note executed by the Pattons in the sum of \$7,400. On December 12, 1929, Grump and Rowena G. Grump, his wife, entered into a contract with the Pattons for the exchange of the aforesaid properties. The contract provided that Grump and Rowena G. Grump, his wife, "agreed to sell and convey to the Pattons the two-flat building, subject to a first mortgage of \$7,000, and the Pattons agreed to sell and convey to Grump and his wife the five lots, subject to the five mortgages above described. The contract also contained the following provision: 'that said first mortgage held by the Avenue State Bank, Oak Park, Illinois, to secure a collateral loan of seven thousand four hundred dollars (\$7,400.00), parties of the first part to release parties of second part from collateral loan.' The exchange transaction was closed at the Avenue State Bank on February 27, 1930. Grump, the Pattons and Mr. Moore M. Petreline, general counsel for the bank, were present at the time, but applicant was not present. Grump delivered to the Pattons a deed in which the properties are described as Herbert D. Grump and Rowena G. Grump, his wife, and which conveyed the Wesley Avenue property to the Pattons in joint tenancy, subject to a \$7,000 mortgage. The deed also contained a provision that the grantees assumed and agreed to pay the mortgage. The Pattons delivered to Grump a deed conveying the five lots in question to Herbert D. Grump and Rowena G. Grump, his wife, in joint tenancy,

subject to the five mortgages. This deed also contained the following, "which five encumbrances the part of the second part assume and agree to pay." Peregrine testified that the Bank had possession of the exchange contract from the time it was executed until the deal was consummated; that he was present in the Bank at the time the exchange transaction was closed on February 25, 1930; that Crumb and the Pattons were also present but that appellant was not; that he, Peregrine, was the attorney that handled the closing of the transaction but that he did not represent appellant, and that "in connection with that [transaction] Mr. Herbert D. Crumb executed and delivered to the Avenue State Bank his collateral note in the sum of \$7,400, bearing that date, February 25, 1930, payable on demand * * *, such note including therein collateral agreement in which was described these ten exhibits, the five trust deeds and five principal notes as being collateral to that loan. On delivery of that principal note signed by Mr. Crumb, Mr. Patton gave the bank his check for \$69.06, which was the computation of accrued interest on his note up to that date and that payment of interest, together with Mr. Crumb's execution and delivery of his collateral note, was taken in payment of the collateral note of the Patton's, and their collateral note was cancelled and surrendered to Mr. Patton;" that at the same time and place "and in connection with that transaction," Crumb gave his note for \$7,400 to the Bank and the collateral note of \$7,400 executed by the Pattons was canceled by the Bank and returned to the Pattons (it was later destroyed by Patton); that Patton gave Crumb a check for \$137.28 "for the balance * * * as indicated by the statement;" that when the deal was closed the Bank retained the said five notes and trust deeds as collateral to the Herbert D. Crumb note and continued to hold said instruments until Crumb paid the Bank his note on September 9, 1930. Plaintiff testified that her mother, Emma J. Diggins, gave the notes to her on March

subject to the five mortgages. This deed also contained the following, "which five mortgages the part of the second part assume and agree to pay." Peregrine testified that the bank had possession of the exchange contract from the time it was executed until the deal was consummated; that he was present in the bank at the time the exchange transaction was closed on February 25, 1930; that Grump and the Pattons were also present but that appellant was not; that he, Peregrine, was the attorney that handled the closing of the transaction but that he did not represent appellant, and that "in connection with that [transaction] Mr. Herbert D. Grump executed and delivered to the Avenue State Bank his collateral note in the sum of \$7,400, bearing that date, February 25, 1930, payable on demand * * *, such note including therein collateral agreement in which was described these ten exhibits, the five trust deeds and five principal notes as collateral to that loan. On delivery of that principal note signed by Mr. Grump, Mr. Patton gave the bank his check for \$69.00, which was the computation of accrued interest on his note up to that date and that payment of interest, together with Mr. Grump's execution and delivery of his collateral note, was taken in payment of the collateral note of the Pattons, and that in collateral note was cancelled and surrendered to Mr. Patton; that at the same time and place "and in connection with that transaction," Grump gave his note for 7,400 to the bank and the collateral note of \$7,400 executed by the Pattons was cancelled by the bank and returned to the Pattons (it was later destroyed by Patton); that Patton gave Grump a check for \$137.28 "for the balance * * * as indicated by the statement;" that when the deal was closed the bank retained the said five notes and trust deeds as collateral to the Herbert D. Grump note and continued to hold said instruments until Grump paid the bank his note on September 9, 1930. Plaintiff testified that her mother, Emma T. Dearing, gave the notes to her on March

1, 1931. The record does not disclose when or how Emma Diggins acquired them. The relationship between Crumb and plaintiff and her mother was such that he had access to their safety deposit boxes in the bank of which he was president, and he handled some of plaintiff's affairs. She testified that she never actually received any interest as payment on these notes, but that interest was put upon her book and credited to her account. Interest was in this manner paid her to September 1, 1937, and the indorsements of the payment of interest on the backs of the five notes are all in the handwriting of Crumb. Plaintiff further testified that she never had any communication of any kind with the Pattons and that appellant never paid her any interest; that she, plaintiff, never had any dealings of any kind whatsoever with appellant. The evidence does not show who paid the interest on the notes, but the Pattons and appellant denied paying any interest on them. The principal of the notes became due March 1, 1933. Crumb died December 31, 1937, and the bill to foreclose was filed on August 11, 1938.

Appellant testified that at the time of the death of Crumb she had been married to him for nineteen years; that before her marriage she worked in the bank of which he was president for about seventeen years; that, at her husband's request, she signed the exchange contract in question, in Harvard; that she claimed no interest in the Wesley avenue property at the time she signed the contract; that she took no part in the negotiations for the exchange of the properties and that she never personally had any dealings with the Pattons; that she was not present at the Avenue State Bank on February 25, 1930, at the closing of the contract for the exchange of the properties; that she signed the deed to the Pattons in Harvard, on the date of the acknowledgment, before R. M. Galvin, cashier of the Harvard State Bank and a notary public. She

1, 1931. The record does not disclose when or how Emma Higgins acquired them. The relationship between Grumb and Plaintiff and her mother was such that he had access to their safety deposit boxes in the bank of which he was president, and he included some of Plaintiff's affairs. She testified that she never actually received any interest as payment on these notes, but that interest was put upon her book and credited to her account. Interest was in this manner paid her to September 1, 1937, and the indentments of the payment of interest on the backs of the five notes are all in the handwriting of Grumb. Plaintiff further testified that she never had any communication of any kind with the Pattons and that appellant never paid her any interest; that she, Plaintiff, never had any dealings of any kind whatsoever with appellant. The evidence does not show who paid the interest on the notes, but the Pattons and appellant denied paying any interest on them. The principal of the notes became due March 1, 1939. Grumb died December 31, 1937, and the bill to foreclose was filed on August 11, 1938.

Appellant testified that at the time of the death of Grumb she had been married to him for nineteen years; that before her marriage she worked in the bank of which he was president for about seventeen years; that, at her husband's request, she signed the exchange contract in question, in Harvard; that she obtained no interest in the Wesley Avenue property at the time she signed the contract; that she took no part in the negotiations for the exchange of the properties and that she never personally had any dealings with the Pattons; that she was not present at the Wayne State Bank on February 25, 1930, at the closing of the contract for the exchange of the properties; that she signed the deed to the Pattons in Harvard, on the date of the acknowledgment, before J. W. Galvin, cashier of the Harvard State Bank and a notary public. She

further testified that the deed from the Pattons to the Crumbs was never delivered to her and that the first time she ever saw it was when she was looking over the contents of her husband's safety deposit box after his death; that prior to that time she never had any reason to suppose that the deed contained a personal contract on her part to pay the trust deeds; that she never at any time consented to the assumption clause in the deed; that she did not know that the assumption clause was in the deed when it was delivered to her husband; that she received no consideration for signing the deed and that she did not retain any part of the purchase price of the five notes or the Wesley avenue property; that she never had any conversation with anyone concerning the assumption of the trust deeds; that she never authorized anyone to insert such a provision in the deed; that she never took or claimed title on that deed; that she never, directly or indirectly, paid any interest or principal on the notes, and never received any rent or other income from the property and never paid any taxes or special assessments on it. Upon cross-examination she testified that she signed the various papers at her husband's request; that her husband did not handle many transactions for her but that she was asked at times to sign papers in his transactions; that she has not conveyed the five lots in question since her husband's death and that she supposes the property is part of his estate; that when she worked at her husband's bank prior to her marriage her work was general - as stenographer, secretary and bookkeeper, and that she would typewrite deeds and mortgages which her husband dictated to her. Her testimony that she had no part in the negotiations for the exchange of the properties; that she never at any time consented to the assumption clause in the deed; that she never claimed title by that deed; that she never had any conversation with anyone concerning the assumption of the trust deed; that she never authorized anyone to insert such a provision in the deed; that she never had any

further testified that she had from the Parsons to the Grubbs was never delivered to her and that the first time she ever saw it was when she was looking over the contents of her husband's safety deposit box after his death; that prior to that time she never had any reason to suppose that the deed contained a personal contract on her part to pay the trust debts; that she never at any time consented to the assumption clause in the deed; that she did not know that the assumption clause was in the deed when it was delivered to her husband; that she received no consideration for signing the deed and that she did not retain any part of the purchase price of the five notes or the Wesley Avenue property; that she never had any conversation with anyone concerning the assumption of the trust debts; that she never authorized anyone to insert such a provision in the deed; that she never took or claimed title on that deed; that she never, directly or indirectly, paid any interest or principal on the notes, and never received any rent or other income from the property and never paid any taxes or special assessments on it. Upon cross-examination she testified that she signed the various papers at her husband's request; that her husband did not handle many transactions for her but that she was asked at times to sign papers in his transactions; that she has not conveyed the five lots in question since her husband's death and that she supposes the property is part of his estate; that when she worked at her husband's bank prior to her marriage her work was general as stenographer, secretary and bookkeeper, and that she would typewrite deeds and mortgages which her husband dictated to her. Her testimony that she had no part in the negotiations for the exchange of the properties; that she never at any time consented to the assumption clause in the deed; that she never claimed title by that deed; that she never had any conversation with anyone concerning the assumption of the trust debts; that she never authorized anyone to insert such a provision in the deed; that she never had any

reason to believe that it contained a personal contract on her part to pay the notes; that she received no consideration for the deed and did not retain any part of the purchase price of the five lots or the Wesley avenue property; that she never, directly or indirectly, paid any interest or principal on the notes, and never received any rents or other income from the property, and never paid any taxes or special assessments on it, stands uncontradicted.

Appellant contends that "the assumption clause contained in a deed must be accepted and agreed to by the grantee. The law requires something more than the mere insertion by the grantor of a clause in a deed that the grantee assumes an encumbrance." This contention is a meritorious one. In Ludlum v. Pinckard, 304 Ill. 449, the defendant was the grantee in a quit claim deed which contained a provision that it was made "subject to all incumbrances of record, which the grantee assumes and agrees to pay." A deficiency judgment was entered against her. On appeal to the Appellate court the decree was reversed and the cause remanded with directions to the trial court to vacate that part of the decree providing for a deficiency judgment (221 Ill. App. 335, 338). The Supreme court reversed the judgment of the Appellate court and affirmed the decree of the Superior court. In its opinion the Supreme court states (pp. 452, 453, 454):

"An agreement on the part of a grantee to pay incumbrances on property conveyed must be based on sufficient consideration and the assumption clause of the deed be accepted and agreed to by the grantee. The law requires something more than the mere insertion by the grantor of a clause in the deed that the grantee assumes an incumbrance. The assumption of such incumbrance is by way of contract or agreement on the part of the grantee, and the grantee's assent to such contract must in some manner appear. While the general rule is that if the grantee takes and claims title under

reason to believe that it contained a personal contract on her part to pay the notes; that she received no consideration for the deed and did not retain any part of the purchase price of the five lots or the Wesley Avenue property; that she never, directly or indirectly, paid any interest or principal on the notes, and never received any rents or other income from the property, and never paid any taxes or special assessments on it, stands uncontradicted.

Appellant contends that "the assumption clause contained in a deed must be accepted and agreed to by the grantee. The law requires something more than the mere insertion by the grantor of a clause in a deed that the grantee assumes an encumbrance." This contention is a meritious one. In Indian v. Lincoln, 304 Ill. 449, the defendant was the grantee in a quit claim deed which contained a provision that it was made "subject to all incumbrances of record, which the grantee assumes and agrees to pay." A deficiency judgment was entered against her. On appeal to the Appellate court the decree was reversed and the case remanded with directions to the trial court to vacate that part of the decree providing for a deficiency judgment (221 Ill. App. 335, 338). The Supreme court reversed the judgment of the Appellate court and affirmed the decree of the Superior court. In its opinion the Supreme court states (pp. 452, 453, 454):

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a deed he takes it by the terms of the deed, yet in order that a grantee be held personally liable for the payment of an incumbrance against the property, it must be shown, in addition to having accepted title to the property, that he assented to the condition of the deed relating to the personal assumption of the debt. Unless it be shown that the grantee in a deed has some reason to suppose that the deed to him contained a personal contract on his part to pay a mortgage or other lien on the property transferred, and that he assented thereto, he cannot be held, as a matter of law, to have assumed such obligation. Thompson v. Dearborn, 107 Ill. 87; Merriman v. Schmitt, 211 id. 263; Blass v. Terry, 156 N. Y. 122; Gold v. Ogden, 61 Minn. 88.

"Applying the above rules to the case at bar, we come to the question whether or not there is in the record evidence showing a delivery and acceptance of the deed containing the assumption clause and assent thereto. Defendant in error offered no evidence, and, as we have seen, the plaintiff in error's evidence shows that the defendant in error had nothing to do with the transfer of the property to her. There is no direct evidence showing that she knew anything about the assumption clause in the deed to her. She took title to the property, however, received the rents therefrom and paid taxes thereon, and while she, under the rules herein referred to, had constructive notice of all the conditions of the deed, such rules do not go to the extent of establishing an agreement on her part to be personally liable for the payment of incumbrances against the property in the absence of proof of some fact or circumstance from which such agreement on her part can be shown. The evidence shows that by letter she sent a payment of \$1000 on this mortgage. While the letter is not in the record, from the testimony relating thereto it is evident that it was written by defendant in error and the money sent by her personally

from the testimony relating thereto it is evident that it was written by defendant in error and the money sent by her separately \$1000 on this mortgage. While the latter is not in the record, shown. The evidence shows that by letter she sent a payment of fact or circumstance from which such fact went on her part can be innumbrances against the property in the absence of proof of some ment on her part to be personally liable for the payment of deed, such rules do not go to the extent of establishing an assumption referred to, had constructive notice of all the conditions of the from and paid taxes thereon, and while she, under the rules therein she took title to the property, however, received the rents there- of the property to her. There is no direct evidence showing that that the defendant in error had nothing to do with the transfer and, as we have seen, the plaintiff in error's evidence shows clause and assent thereto. Defendant in error offered no evidence, a delivery and acceptance of the deed containing the assumption the question whether or not there is in the record evidence showing "Applying the above rules to the case at bar, we come to

V. Terry, 175 N. Y. 122; Gold v. O'Leary, 31 Conn. 38.
Dearyborn, 107 Ill. 87; Harrison v. O'Connell, 111 Ill. 263; Hines
a matter of law, to have assumed such obligation. Thompson v.
transferred, and that he assented thereto, he cannot be held, as tract on his part to pay a mortgage or other lien on the property reason to suppose that the deed to him contained a personal com- debt. Unless it be shown that the grantee in a deed has some condition of the deed relating to the personal assumption of the having accepted title to the property, that he assented to the prance against the property, it must be shown, in addition to grantee be held personally liable for the payment of an interest a deed he takes it by the terms of the deed, yet in order that

to apply on this mortgage. It does not appear that the money came from the rents of the property or from any other source except the personal funds of defendant in error. She contends, however, - and in this she is supported by the Appellate Court, - that this is merely an evidence of a desire on her part to free the property of the lien and not evidence of acceptance on her part of the assumption clause of the deed. With this we cannot agree. In the absence of any proof limiting the effect of such payment, we are of the opinion that it must be taken as an act of assent on her part to the assumption clause of the quit-claim deed to her. This payment undoubtedly establishes actual knowledge on her part of the existence of this mortgage. It also negatives any repudiation of the assumption clause in the deed and constitutes evidence of conduct on her part denoting an acceptance of such clause. It is not necessary, to show an acceptance of such a clause, that the grantee in express language accepted or ratified it. Such may be shown by any facts and circumstances evidencing such acceptance. We think that under the circumstances of this case this payment on the mortgage must be taken as evidence of acceptance of the assumption clause in the deed."

The appellant contends that the record fails to show any facts or circumstances evidencing that appellant accepted or ratified the provision in question in the deed. Plaintiff admits that the assumption clause was binding upon Crumb, and calls attention to the fact that no deficiency judgment was taken against his estate by plaintiff.

Plaintiff does not question the correctness of the general rule announced by the Supreme court in Ludlum v. Pinckard, but calls attention to the following finding of the chancellor in the decree of sale; "* * * that it was the intention of the parties to said contract that the defendant, Rowena G. Crumb and H. D. Crumb should assume and agree to pay said mortgages," and she

to apply on this mortgage. It does not appear that the money came from the rents of the property or from any other source except the personal funds of defendant in error. The contents, however, - and in this she is supported by the Appellate Court, - that this is merely an evidence of a desire on her part to free the property of the lien and not evidence of acceptance on her part of the assumption clause of the deed. With this we cannot agree. In the absence of any proof limiting the effect of such payment, we are of the opinion that it must be taken as an act of assent on her part to the assumption clause of the quit-claim deed to her. This payment undoubtedly establishes actual knowledge on her part of the existence of this mortgage. It also negatives any repudiation of the assumption clause in the deed and constitutes evidence of conduct on her part denoting an acceptance of such a clause. It is not necessary, to show an acceptance of such a clause, that the grantee in express language accepted or ratified it. Such may be shown by any facts and circumstances evidencing such acceptance. We think that under the circumstances of this case this payment on the mortgage must be taken as evidence of acceptance of the assumption clause in the deed."

The appellant contends that the record fails to show any facts or circumstances evidencing that appellant accepted or ratified the provision in question in the deed. Plaintiff admits that the assumption clause was binding upon Grubb, and calls attention to the fact that no deficiency judgment was taken against his estate by plaintiff.

Plaintiff does not question the correctness of the general rule announced by the Supreme Court in Ingling v. Winkens, but calls attention to the following finding of the chancellor in the decree of sale: " * * * that it was the intention of the parties to said contract that the defendant, Rowena G. Grubb and H. D.

insists that the finding was warranted by the evidence. Plaintiff contends that "it is well settled that an agreement to pay a mortgage by a purchaser from the mortgagor need not be contained in the deed but may be shown by any other writing or by parol evidence," that the chancellor's finding was not made dependent upon the assumption clause in the deed and that it must be assumed that the finding was based upon all competent evidence in the record that tended to prove what the intention of the parties was. Neither plaintiff nor the Pattons offered any oral evidence as to the understanding or intention of the parties, but plaintiff insists that the exchange contract, properly construed, obligated appellant to pay the mortgages. She concedes that the words, "subject to mortgage," used in the contract "are not relevant to the question of personal liability," but she argues that the use of the words, "parties of the first part to release parties of the second part from collateral loan," ~~support~~ ^{support} in the exchange agreement/~~the~~ support the chancellor's construction of the contract. Tested by the exchange agreement, alone, plaintiff would be obligated to release the Pattons from the collateral loan held by the Avenue State Bank. The undisputed evidence of Peregrine shows, however, that at the closing of the exchange transaction when Crumb gave his personal note for \$7,400 to the Bank Peregrine marked the Patton note paid and cancelled and returned it to the Pattons, Patton later destroying it; that as a part of the transaction the Bank retained the five trust deeds and the five notes as collateral to the note of Crumb, Patton, a witness in the case, did not contradict in any way the testimony given by Peregrine, nor did he offer any evidence to support the verified cross-complaint filed by himself and wife in which they allege that the Bank promised to return the notes to the Pattons when the loan was paid, but that after said loan was paid, in breach of its agreement, the Bank delivered said notes and trust deeds to Crumb and that as a result of said breach of

insists that the finding was warranted by the evidence. Plaintiff contends that "it is well settled that an agreement to pay a mortgage by a purchaser from the mortgagor need not be contained in the deed but may be shown by any other writing or by parol evidence," that the chancellor's finding was not made dependent upon the assumption alone in the deed and that it must be assumed that the finding was based upon all competent evidence in the record that tended to prove what the intention of the parties was. Neither plaintiff nor the Pattons offered any oral evidence as to the understanding or intention of the parties, but plaintiff insists that the exchange contract, properly construed, obligated appellant to pay the mortgages. She concedes that the words, "subject to mortgage," used in the contract "are not relevant to the question of personal liability," but she argues that the use of the words "parties of the first part to release parties of the second part from collateral loan," ~~xxxxxx~~ in the exchange agreement ^{support} the chancellor's construction of the contract. Tested by the exchange agreement, alone, plaintiff would be obligated to release the Pattons from the collateral loan held by the Avenue State Bank. The undisputed evidence of Peterline shows, however, that at the closing of the exchange transaction when Grumb gave his personal note for \$7,400 to the Bank Peterline turned the Patton note paid and cancelled and returned it to the Pattons, Patton later destroyed it; that as a part of the transaction the Bank retained the five trust deeds and the five notes as collateral to the note of Grumb. Patton, a witness in the case, did not contradict in any way the testimony given by Peterline, nor did he offer any evidence to support the verified cross-complaint filed by himself and wife in which they allege that the Bank promised to return the notes to the Pattons when the loan was paid, but that after said loan was paid, in breach of its agreement, the Bank delivered said notes and trust deeds to Grumb and that as a result of said breach of

agreement said notes and trust deeds came into the hands of Stella McFadden, and that the Pattons have been put to great expense to defend this case and pray that the Bank may be required to reimburse them with the amounts expended in connection with the preparation of their defense. The testimony of Peregrine shows conclusively that at the time of the closing^{of} the exchange transaction and as a part of it the Pattons allowed the Bank to retain the notes and trust deeds as collateral security for the \$7,400 note of Crumb, and that they did not even insist upon appellant's signing that note. Patton made no attempt to explain why he allowed all this to be done and the record is barren as to the exact understanding between Patton and Crumb in reference to the collateral; that there must have been an understanding is clear. The answer of Avenue State Bank to the cross-complaint of the Pattons, verified by Peregrine, alleges, inter alia:

"That on or prior to February 25, 1930, the said William A. Patton and A. Louise Patton proposed to this defendant that they would cause the said Herbert D. Crumb to execute and deliver, in payment of the principal of their said collateral note, his collateral note to this defendant in the like principal sum of \$7,400 and would cause the same to be secured by deposit of the same said mortgage notes and trust deeds as collateral security therefor; and they accordingly did, on the day last aforesaid, cause the said Herbert D. Crumb to execute and deliver to this defendant his note as above mentioned with a collateral agreement appended signed by said Herbert D. Crumb, reciting delivery by him to this defendant of the aforementioned mortgage notes and trust deeds, as collateral security to said note so executed and delivered by him; and this defendant thereupon accepted said note and collateral agreement of the said Herbert D. Crumb, in payment of the principal of said collateral note of said William A. Patton and A. Louise Patton, they then and there paying

agreement said notes and trust deeds came into the hands of Stella Wolfenden, and that the Pattons have been paid to great expense to defend this case and pray that the bank may be permitted to reimburse them with the amounts expended in connection with the prosecution of their defense. The testimony of Parsons shows conclusively that at the time of the closing of the exchange transaction and as a part of it the Pattons allowed the bank to retain the notes and trust deeds as collateral security for the \$7,400 note of Grumb, and that they did not even insist upon appellant's signing that note. Patton made no attempt to explain why he allowed all this to be done and the record is barren as to the exact understanding between Patton and Grumb in reference to the collateral; that there must have been an understanding is clear. The answer of course State Bank to the cross-complaint of the Pattons, verified by

Parsons, alleges, inter alia:

"That on or prior to January 22, 1930, the said William A. Patton and A. Louis Patton proposed to this defendant that they would cause the said Herbert D. Grumb to execute and deliver, in payment of the principal of their said collateral note, his collateral note to this defendant in the like principal sum of \$7,400 and would cause the same to be secured by deposit of the same said mortgage notes and trust deeds as collateral security therefor; and that accordingly did, on the day last aforesaid, cause the said Herbert D. Grumb to execute and deliver to this defendant his note as above mentioned with a collateral agreement appended signed by said Herbert D. Grumb, reciting delivery by him to this defendant of the aforesaid mortgage notes and trust deeds, as collateral security to the said note so executed and delivered by him; and this defendant thereupon accepted said note and collateral agreement of the said Herbert D. Grumb, in payment of the principal of said collateral note of said William A. Patton and A. Louis Patton; that then and thereupon

the accrued interest thereon, and cancelled and surrendered to them said last mentioned collateral note so paid, all on the day last aforesaid; and the said William A. Patton and A. Louise Patton then and there either (1) received from this defendant the said mortgage notes and trust deeds, and delivered the same to said Herbert D. Crumb who then and there delivered them to this defendant as collateral security to his note as aforesaid, or (2) then and there directed and consented that the same be retained and held by this defendant as collateral security to said note of Herbert D. Crumb, in accordance with the provisions of said note and the collateral agreement appended thereto; thereafter said mortgage notes and trust deeds were held by this defendant as collateral security to said note of Herbert D. Crumb until September 9, 1930, on which date the said Herbert D. Crumb paid his said note and this defendant thereupon, to-wit, on or prior to September 10, 1930, cancelled and surrendered to the said Herbert D. Crumb his aforesaid collateral note so paid, and surrendered to him the said notes and trust deeds so held as collateral security thereto, this defendant having had no notice from the said William A. Patton or A. Louise Patton that the same should be disposed of, upon payment of said note, other than by surrender to the said Herbert D. Crumb."

Patton, in his testimony, made no attempt to dispute the allegations in the aforesaid answer, nor have the Pattons appealed from that part of the decree that dismisses their cross-complaint for want of equity. On September 9, 1930, Crumb paid in full his note for \$7,400 and the Bank forwarded the five notes and trust deeds to him. If we assume that Crumb later negotiated these mortgage notes, nevertheless, that fact, under all the evidence, would not make appellant personally liable for the notes. If Crumb had no right to negotiate the notes - and the evidence fails to show that he had no such right - the Pattons and the Bank, alone,

the accrued interest thereon, and cancelled and surrendered to said said last mentioned collateral note so paid, all on the day last aforesaid; and the said William A. Patton and A. Louise Patton and there either (1) received from this defendant the said mortgage notes and trust deeds, and delivered the same to said Herbert D. Grumb who then and there delivered them to this defendant as

collateral security to his note as aforesaid, on (2) then and there directed and consented that the same be retained and held by this defendant as collateral security to said note of Herbert D. Grumb, in accordance with the provisions of said note and the collateral

agreement appended thereto; thereafter said mortgage notes and trust deeds were held by this defendant as collateral security to said note of Herbert D. Grumb until September 9, 1930, on which

date the said Herbert D. Grumb paid his said note and this defendant thereupon, to-wit, on or prior to September 10, 1930, cancelled and

surrendered to the said Herbert D. Grumb his aforesaid collateral note so paid, and surrendered to him the said notes and trust deeds so held as collateral security thereto, this defendant having had no notice from the said William A. Patton or A. Louise Patton that the same should be disposed of, upon payment of said note, other than

by surrender to the said Herbert D. Grumb."

Patton, in his testimony, made no attempt to dispute the allegations in the aforesaid answer, nor have the at one appeared from that part of the decree that dismisses their cross-complaint for want of equity. On September 9, 1930, Grumb paid in full his note for \$7,400 and the bank forwarded the five notes and trust

deeds to him. If we assume that Grumb later negotiated these mortgage notes, nevertheless, that fact, under all the evidence, would not make appellant personally liable for the notes. If

Grumb had no right to negotiate the notes - and the evidence fails to show that he had no such right - the Pattons and the Bank, alone,

put it in his power to negotiate the notes; yet the deficiency judgment is entered against appellant, alone, although she did nothing that would give Crumb any such power. The proof shows clearly that the Pattons have no right to complain that the provision in question in the exchange agreement was not fully carried out by the Crumbs. Neither plaintiff nor her mother were parties to the exchange agreement and there is no evidence that either had any knowledge of the exchange agreement at the time the mother obtained the notes. We find no merit in plaintiff's argument that if full effect is given to all of the facts and circumstances surrounding the execution of the exchange agreement and the deed the finding of the chancellor as to the intention of the parties can be sustained. We hold that the use of the words in the exchange contract, viz., "parties of the first part to release parties of the second part from collateral loan," do not support the chancellor's interpretation of the contract and are not sufficient to support the deficiency judgment against appellant. No one disputes plaintiff's right to a foreclosure and sale of the property in question.

The decree of foreclosure found "that physical delivery of said deed was made to H. D. Crumb, and that H. D. Crumb was authorized to accept the said deed by Rowena G. Crumb on her behalf and as her agent," and plaintiff argues that the proof sustains this finding. The theory of plaintiff's case as set forth in her complaint is that "Rowena G. Crumb, a widow, is the record holder of the equity of redemption of said premises; that she assumed and agreed to pay the aforesaid mortgage." Appellant filed her answer alleging that the deed was never delivered to her nor accepted by her, and that she never agreed to assume the mortgages, but plaintiff did not then amend her complaint nor did she file a replication to the answer. Appellant asserts that the theory of agency was not advanced at the hearing and that

but it in his power to negotiate the notes; yet the deficiency judgment is entered against appellant alone, although she did nothing that would give Grumb any such power. The proof shows clearly that the Pattons have no right to complain that the provision in question in the exchange agreement was not fully carried out by the Grumbs. Neither plaintiff nor her mother were parties to the exchange agreement and there is no evidence that either had any knowledge of the exchange agreement at the time the mother obtained the notes. We find no merit in plaintiff's argument that its full effect is given to all of the facts and circumstances surrounding the execution of the exchange agreement and the deed the finding of the chancellor as to the intention of the parties can be sustained. We hold that the use of the words in the exchange contract, viz., "parties of the first part to release parties of the second part from collateral loan," do not support the chancellor's interpretation of the contract and are not sufficient to support the deficiency judgment against appellant. No one disputes plaintiff's right to a foreclosure and sale of the property in question.

The decree of foreclosure found "that physical delivery of said deed was made to H. D. Grumb, and that H. D. Grumb was authorized to accept the said deed by Rowena O. Grumb on her behalf and as her agent," and plaintiff argues that the proof sustains this finding. The theory of plaintiff's case as set forth in her complaint is that "Rowena O. Grumb, a widow, as the record holder of the equity of redemption of said premises; that she assumed and agreed to pay the aforesaid mortgage," appellant filed her answer alleging that the deed was never delivered to her nor accepted by her, and that she never agreed to assume the mortgage, but plaintiff did not then amend her complaint nor did she file a replication to the answer. Appellant asserts that the theory of her case was never changed at the hearing and that

the master made no finding as to the alleged agency of the husband, and she contends that the finding of the chancellor that the husband acted as agent of appellant is not sustained by the proof. We agree with this contention. We also agree with appellant's further contention that "if Herbert D. Crumb held himself out as the agent of his wife (and there is no evidence that he did), persons dealing with him would be bound at their peril to ascertain not only the fact of the agency but the extent of his authority as such agent;" that "this rule is particularly true where, as here, the agent is also personally interested in the transaction;" that "the authority of anyone to accept for her a deed with an assumption clause, having been explicitly denied by Rowena G. Crumb, the burden must rest upon the plaintiff to show certainly and specifically that the authority was granted; and there is no evidence of agency in the case at bar." The Pattons made no attempt to contact appellant, and, as heretofore stated, the Bank dealt exclusively with Crumb and the Pattons. It is significant that neither the Bank nor the Pattons asked appellant to sign the \$7,400 collateral note executed by Crumb.

After giving careful consideration to the instant appeal we have concluded that under the facts and the law the chancellor erred in finding in the decree of November 8, 1940, that appellant was liable for any deficiency, and in entering its decree of December 23, 1940, holding appellant liable for the deficiency of \$11,496.43.

The decree of the Circuit court of Cook county of December 23, 1940, is reversed in toto; the decree of the Circuit court of Cook county of November 8, 1940, in so far as it adjudges that appellant is liable for any deficiency, is reversed.

DECREE OF DECEMBER 23, 1940, REVERSED IN TOTO;
DECREE OF NOVEMBER 8, 1940, IN SO FAR AS IT
JUDGES APPELLANT LIABLE FOR ANY DEFICIENCY,
REVERSED.

Sullivan, P. J., and Friend, J., concur.

The master made no finding as to the alleged agency of the husband, and she contends that the finding of the chancellor that the husband acted as agent of appellant is not sustained by the proof. We agree with this contention. We also agree with appellant's further contention that "if Herbert D. Gramp held himself out as the agent of his wife (and there is no evidence that he did), persons dealing with him would be bound at their peril to ascertain not only the fact of the agency but the extent of his authority as such agent;" that "this rule is particularly true where, as here, the agent is also personally interested in the transaction;" that "the authority of anyone to accept for her a debt with an assumption clause, having been explicitly denied by her, the burden was rest upon the plaintiff to show certainly and specifically that the authority was granted; and there is no evidence of agency in the case at bar." The Patton made no attempt to contact appellant, and, as heretofore stated, the bank dealt exclusively with Gramp and the Pattons. It is significant that neither the bank nor the Pattons asked appellant to sign the \$7,400 collateral note executed by Gramp.

After giving careful consideration to the instant appeal we have concluded that under the facts and the law the chancellor erred in finding in the decree of November 6, 1940, that appellant was liable for any deficiency, and in awarding its decree of December 23, 1940, holding appellant liable for the deficiency of \$11,496.43.

The decree of the Circuit Court of Cook County of December 23, 1940, is reversed insofar as the decree of the Circuit Court of Cook County of November 6, 1940, in so far as it adjudges that appellant is liable for any deficiency, is reversed.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 14th day of December, 1940.
JUDGES APPELLANT LITIGANT AND DEFENDANT
SULLIVAN, P. J., and Friend, J., concur.

41745

316 I.A. 447²

PEOPLE OF THE STATE OF ILLINOIS
ex rel. ERICK ANDERSON et al.,
Appellees,

v.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 31, 1938, twenty-seven relators filed their petition for a writ of mandamus to compel the payment by respondents of certain sums of money alleged to have been wrongfully deducted from the salaries of the relators for the years 1933 to 1936, inclusive, while the relators were employed by the City of Chicago as brick pavers. After respondents filed an answer the relators filed a reply thereto. The trial court, after considering the cause upon the pleadings and evidence introduced, entered ^a judgment order that a writ of mandamus issue directing respondents to pay to each of the relators a certain sum of money. The total amount ordered to be paid to the twenty-seven relators was \$19,360. The judgment order required payments for the year 1934 and subsequent years. Payment was not required for the year 1933 as it was agreed that even if the claim for that year was valid the claim was barred by the Statute of Limitations.

The petition alleges that the City of Chicago is a municipal corporation; that the city council consists of the mayor and fifty aldermen; that the city council is required, under Section 2A of Article VII of the Cities and Villages Act, to pass annually an appropriation bill; that on June 14, 1933, the city council passed the annual appropriation bill of the City for the year 1933; that Oscar F. Hewitt was duly appointed Commissioner of Public Works, with power to appoint

PEOPLE OF THE STATE OF ILLINOIS
ex rel. ERIC ANDERSON et al.

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APPELLANTS, CITY OF CHICAGO et al.,

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

On December 31, 1938, twenty-seven relations filed their

that even if the claim for that year was valid, the claim was
Payment was not required for the year 1933 as it was barred
required payments for the year 1934 and subsequent years.
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a certain sum of money. The total amount ordered to be paid
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introduced, entered judgment order that a writ of mandamus
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ents of certain sums of money alleged to have been wrongfully
petition for a writ of mandamus to compel the payment by respondents.

The petition alleges that the City of Chicago is a municipal corporation; that the city council consists of the mayor and fifty aldermen; that the city council is required under Section 2A of Article VII of the Cities and Villages Act, to pass annually an appropriation bill; that on June 14, 1933, the city council passed the annual appropriation bill of the city for the year 1933; that Oscar F. Hewitt was duly appointed Commissioner of Public Works, with power to appoint

all subordinates of the office; that within the Bureau of Streets of the City there has been established a division known as the Pavement, Improvement & Repair Division of the said Bureau; that the relators are duly certified by the Civil Service Commission of the City for appointment in said division of said Bureau as brick pavers, and that for the years 1933 to 1936, inclusive, the salaries for said position were fixed for the respective years in the annual appropriation bills at the per diem amount of \$12; that for the years 1933 to 1936, inclusive, the relators worked and performed their duties as brick pavers, but the City failed to pay them at the rate of \$12 per day but paid them at the rate of \$10 a day and thereby deprived them of \$2 per day for each of the days they worked during the years 1933 to 1936, inclusive; that relators worked five days a week for a period of nine months during the years 1933 to 1936 and that the defendant was indebted to the relators on December 31, 1936, in the sum of \$40,320; that relators have requested the City to pay them their lawful salaries for said years, but the City has neglected and refused to make such payment.

The petition prays that a writ of mandamus issue against all of the defendants commanding them to perform any and all acts necessary to pay to the relators the amounts owing to them.

The answer of respondents, filed on May 24, 1939, admits the allegations referring to the incorporation of the city, the passage of the annual appropriation bills, and the election of the officers; denies that the position of brick paver was created by the general ordinances of the City, as alleged in paragraph 9 of the petition, but avers that the position of brick paver was provided for by the annual appropriation bills passed by the city council for the years 1933 to 1936, inclusive; denies that the salaries for the position of brick paver were fixed by the city council for the years 1933 to 1936, inclusive, in the annual appro-

all subordinates of the office; that within the Bureau of Streets of the City there has been established a division known as the Pavement, Improvement & Repair Division of the said Bureau; that the relators are duly certified by the Civil Service Commission of the City for appointment in said division of said Bureau as brick pavers, and that for the years 1933 to 1936, inclusive, the salaries for said position were fixed for the respective years in the annual appropriation bills at the per diem amount of \$12; that for the years 1933 to 1936, inclusive, the relators worked and performed their duties as brick pavers, but the City failed to pay them at the rate of \$12 per day but paid them at the rate of \$10 a day and thereby deprived them of \$2 per day for each of the days they worked during the years 1933 to 1936, inclusive; that relators worked five days a week for a period of nine months during the years 1933 to 1936 and that the defendant was indebted to the relators on December 31, 1936, in the sum of \$40,350; that relators have requested the City to pay them their lawful salaries for said years, but the City has neglected and refused to make such payment. The petition prays that a writ of mandamus issue against all of the defendants commanding them to perform any and all acts necessary to pay to the relators the amounts owing to them. The answer of respondents, filed on May 24, 1939, admits the allegations relating to the incorporation of the city, the passage of the annual appropriation bills, and the election of the officers; denies that the position of brick paver was created by the general ordinances of the City, as alleged in paragraph 9 of the petition, but avers that the position of brick paver was provided for by the annual appropriation bills passed by the city council for the years 1933 to 1936, inclusive; denies that the salaries for the position of brick paver were fixed by the city council for the years 1933 to 1936, inclusive, in the annual appro-

apropriation bills passed for those respective years at the per diem amount of \$12, but avers that the annual appropriation bills of those years appropriated for the position of brick pavers in a certain manner (as hereinafter appears). The appropriation bills and the respective Sections 8 of each appropriation bill for the years 1933 to 1936, inclusive, are set out verbatim in the answer. The answer avers that the relators that worked and performed their duties earned their salaries for the years 1933 to 1936 at the rate fixed by the city council of the City in the annual appropriation bills for the respective years. The answer admits that the City paid to the relatorsthat worked and performed their duties as brick pavers the sum of \$10 per day; denies that respondents deprived the relators of \$2 a day for each of the days they worked during the said years; denies that there is any money owing to the relators or that the agents of the City have made promises to pay to relators moneys alleged to be due them from the City. The answer further denies that there are any moneys on hand with whichto pay to the relators any amounts alleged to be due them; avers that during the years 1933, 1934, 1935 and 1936 the city council, in the annual appropriation bills for the respective years, provided for a reduction of all salaries and wages for all officers and employees at the rate of seventy-eight days for the years 1933, 1934 and 1935, and thirty-nine days for the year 1936; that all officers and employees were paid on the basis of such reduced appropriation in accordance with the provisions of Sections 8 in the respective annual appropriation bills; that the relators, as brick pavers, were similarly paid on the basis of the reduced appropriations as aforesaid; that each of said relators received a warrant drawn upon the city treasurer signed by the mayor and countersigned by the city comptroller for each semi-monthly period of his employ-

the city comptroller for each semi-monthly period of his employment upon the city treasurer signed by the mayor and countersigned by aforesaid; that each of said relators received a warrant drawn similarly paid on the basis of the reduced appropriations as appropriation bills; that the relators, as brick pavers, were paid on the basis of such reduced appropriation in accordance with the provisions of sections 8 in the respective annual days for the year 1936; that all officers and employees were eight days for the years 1933, 1934 and 1935, and thirty-nine and wages for all officers and employees at the rate of seventy-five for the respective years, provided for a reduction of all salaries 1935 and 1936 the city council, in the annual appropriation bills alleged to be due them; avers that during the years 1933, 1934, moneys on hand with which to pay to the relators any amounts them from the City. The answer further denies that there are any have made promises to pay to relators moneys alleged to be due any money owing to the relators or that the agents of the City the days they worked during the said years; denies that there is that respondents deprived the relators of \$2 a day for each of their duties as brick pavers the sum of \$10 per day; denies that the City paid to the relators that worked and performed appropriation bills for the respective years. The answer admits rate fixed by the city council of the City in the annual appropriation bills earned their salaries for the years 1933 to 1936 at the The answer avers that the relators that worked and performed their years 1933 to 1936, inclusive, are set out verbatim in the answer, and the respective sections 8 of each appropriation bill for the certain manner (as hereinafter appears). The appropriation bills those years appropriated for the position of brick pavers in a amount of \$12, but avers that the annual appropriation bills of appropriation bills passed for those respective years at the per diem

ment in an amount equal to the salaries or wages of such position earned during that period by said relators; that each of said relators presented or caused to be presented to the city treasurer each of said warrants and received and accepted the amount thereof for the labor or service stated for such period; that prior to the issuance of said voucher each of said relators signed an identification slip and receipt in form as follows:

"City of Chicago

Pay Roll

Line No. _____

"Department of _____

"Bureau of _____

No. _____

Days _____

"Date _____ 193 _____

Amount \$ _____

"Identification and Receipt
"(Not Transferable)

"Name _____

"For period ending _____

" _____
"Official in Charge.

"Received the amount above named, for the labor or service as stated, which was performed for the benefit and account of the City of Chicago, and has not heretofore been paid.

" _____
"Employee's Signature.

" _____
"Address"

that by reason of the execution and presentation of said receipt the relators are estopped from making any further claim for the same services upon which that claim is based. The answer further avers that the relators are guilty of laches in failing to petition any court of competent jurisdiction immediately after the passage of the annual appropriation ordinance for each year to award the writ of mandamus to compel the city council to appropriate each year an amount sufficient to pay the full salaries claimed by relators during each year; that relators knew immediately after the passage of the appropriation ordinance for each such year

ment in an amount equal to the salaries or wages of such position earned during that period by said relators; that each of said relators presented or caused to be presented to the city treasurer each of said warrants and received and accepted the amount thereof for the labor or service stated for such period; that prior to the issuance of said voucher each of said relators signed an identification slip and receipt in form as follows:

"City of Chicago
Department of _____
Bureau of _____
Date _____ 193____
Amount \$ _____
Days _____
No. _____
Pay Roll _____
Line No. _____

"Identification and Receipt
"(Not Transferable)"

"Name _____
"For period ending _____
" _____
"Official in Charge."

"Received the amount above named, for the labor or service as stated, which was performed for the benefit and account of the City of Chicago, and has not heretofore been paid.

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"Employee's Signature."
" _____
"Address"

that by reason of the execution and presentation of said receipt the relators are estopped from making any further claim for the same services upon which that claim is based. The answer further avers that the relators are guilty of laches in failing to petition any court of competent jurisdiction immediately after the passage of the annual appropriation ordinance for each year to award the writ of mandamus to compel the city council to appropriate each year an amount sufficient to pay the full salaries claimed by relators during each year; that relators knew immediately after the passage of the appropriation ordinance for each year

that in and by said appropriation ordinance insufficient sums of money were appropriated to pay the amounts which relators claim as their rightful salaries; that by reason of the delay of relators in asserting their claims the city will be unable to make up the large deficit of \$22,500,000 which would occur if the writ of mandamus were ordered to issue in this case; that the amount of taxes which the City is authorized to levy each year is limited by statute and the revenues of the City from all other sources, together with the realizable revenue from taxes, are not more than sufficient to pay the expense of the essential functions of government each year; that if relators had been diligent in asserting their claims immediately, and if their claims were declared to be valid, the City might have been enabled to curtail the less essential functions of government so as to provide the necessary funds for the payment of the claims of the relators during that year and the city council might have been warned to reduce, by appropriate ordinances, the salaries of all officers and employees of the City so that no question of its intention to reduce such salaries would arise; that if the City were now obligated by a liability to all officers and employees of the City amounting to more than \$22,500,000 brought about by the neglect and delay of relators and others in asserting their claims, respondents believe and so state the fact to be that the credit of the City would become seriously impaired and it would be unable to meet its ordinary and necessary expenses unless the salaries of all officers and employees serving the City in the future were reduced so radically that no one would be willing to serve the City. Respondents further aver that the issuance of the writ of mandamus will cause confusion, disorder and grave public inconvenience and will result in disarranging the public service in the City.

Relators filed a reply to respondents' answer, in which

that in and by said appropriation ordinance insufficient sums of money were appropriated to pay the amounts which relators claim as their rightful salaries; that by reason of the delay of relators in asserting their claims the city will be unable to make up the large deficit of \$22,500,000 which would occur if the writ of mandamus were ordered to issue in this case; that the amount of taxes which the City is authorized to levy each year is limited by statute and the revenues of the City from all other sources, together with the realizable revenue from taxes, are not more than sufficient to pay the expense of the essential functions of government each year; that if relators had been diligent in asserting their claims immediately, and if their claims were declared to be valid, the City might have been enabled to curtail the less essential functions of government so as to provide the necessary funds for the payment of the claims of the relators during that year and the city council might have been warned to reduce, by appropriate ordinances, the salaries of all officers and employees of the City so that no question of its intention to reduce such salaries would arise; that if the City were now obligated by a liability to all officers and employees of the City amounting to more than \$22,500,000 probably about by the neglect and delay of relators and others in asserting their claims, respondents believe and so state the fact to be that the credit of the City would become seriously impaired and it would be unable to meet its ordinary and necessary expenses unless the salaries of all officers and employees serving the City in the future were reduced so radically that no one would be willing to serve the City. Respondents further aver that the issuance of the writ of mandamus will cause confusion, disorder and grave public inconvenience and will result in embarrassing the public service in the City.

Relators filed a reply to respondents' answer, in which

they allege that prior to the year 1932, relators worked six days per week, and that when salary reductions were made by respondents relators were permitted to work only five days per week; that they were discriminated against by respondents in that not only their hours of labor were reduced during the years mentioned, but their salaries, although fixed at \$12 per day by the city council, were decreased to \$10 by the department head without any authority from the city council so to do; that employees working for respondents on a per diem basis were not included in the salary reduction ordinances passed by the city council of the City for the years 1933, 1934, 1935, 1936 and 1937, and that no lump sum appropriation was set up by the city council for the payment of the salaries of the relators or any other per diem men in the service of the City; that the salary reduction ordered by the city council applied only to employees working on an annual, monthly or weekly basis, and did not apply in any way to employees working on a per diem basis.

The theory of relators is that in the case of per diem employees the reduction was brought about by respondents' reducing the number of days in each week relators were permitted to work; that the reduction ordinance included only employees working on an annual, monthly or weekly basis, and did not include employees working on a per diem basis; that their days of labor were reduced, and, in addition to being deprived of the right to work full time, their salaries were reduced from \$12 per day to \$10 per day.

The theory of respondents is "that the sum of \$12 per day specified for brick pavers in the respective annual appropriation bills were merely a base figure from which the actual salaries fixed in the annual appropriation bill were determined by computation required by Section 8 of each annual appropriation ordinance pursuant to the terms of which all employees of the City * * * sustained reductions in salary as an economy measure of

they allege that prior to the year 1932, raters worked six days per week, and that when salary reductions were made by respondents raters were permitted to work only five days per week; that they were discriminated against by respondents in that not only their hours of labor were reduced during the years mentioned, but their salaries, although fixed at \$12 per day by the city council, were decreased to \$10 by the department head without any authority from the city council so to do; that employees working for respondents on a per diem basis were not included in the salary reduction ordinances passed by the city council of the city for the years 1932, 1933, 1934, 1935, 1936 and 1937, and that no lump sum appropriation was set up by the city council for the payment of the salaries of the raters or any other per diem men in the service of the city; that the salary reduction ordered by the city council applied only to employees working on an annual, monthly or weekly basis, and did not apply in any way to employees working on a per diem basis.

The theory of raters is that in the case of per diem employees the reduction was brought about by respondents' reducing the number of days in each week raters were permitted to work; that the reduction ordinance included only employees working on an annual, monthly or weekly basis, and did not include employees working on a per diem basis; that their days of labor were reduced, and, in addition to being deprived of the right to work full time, their salaries were reduced from \$12 per day to \$10 per day.

The theory of respondents is "that the sum of \$10 per day specified for brick pavers in the respective annual appropriation bills were merely a base figure from which the actual salaries fixed in the annual appropriation bill were determined by comparison required by Section 8 of each annual appropriation ordinance pursuant to the terms of which all employees of the city

the City * * *."

Respondents contend that "the trial court erred in its construction of the annual appropriation bills for the years in question, particularly Section 8 of each annual appropriation bill," and "erred in entering judgment against the respondents and in favor of the relators."

The relators are employees of the City of Chicago in the classified service of the City and they were so employed during the years 1933 to August 1, 1937, inclusive. As heretofore stated, it was agreed by the parties upon the trial that the claims of the relators for the year 1933, even if valid, were barred by the Statute of Limitations, and the judgment of the court required payment for the years 1934, 1935, 1936, and for a certain part of the year 1937.

The manner of appropriating for the salaries of relators for the years in question is shown by the following portions of the 1934 ordinance:

"Bureau of Streets

"Amounts
Appropriated

"* * *

"Pavement Improvements and Repairs Division.

"* * *

"For labor, material, truck hire, equipment and miscellaneous expenses in connection with repairing permanent pavements, oiling, screening and repairing macadam pavement, whether by contract or by employes of the City. In case the Commissioner of Streets and Electricity decides that such work or any part thereof shall be performed by contract, it shall be done in accordance with a plan to be submitted by him and approved by the City Council. Expenditures ^{from this appropriation} are to be made in accordance with the general policy established by the City Council in connection

the City * * * "

Respondents contend that "the trial court erred in its construction of the annual appropriation bills for the years in question, particularly Section 8 of each annual appropriation bill," and "erred in entering judgment against the respondents and in favor of the relators."

The relators are employees of the City of Chicago in the classified service of the City and they were so employed during the years 1933 to August 1, 1937, inclusive. As heretofore stated, it was agreed by the parties upon the trial that the claims of the relators for the year 1933, even if valid, were barred by the statute of limitations, and the judgment of the court requiring payment for the years 1934, 1935, 1936, and for a certain part of the year 1937.

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"Bureau of Streets

"Amounts
Appropriated

"* * *

"Pavement Improvements and Repairs Division.

"* * *

"For labor, material, truck hire, equipment and miscel-

laneous expenses in connection with repaving permanent pavements, oiling, screening and repaving macadam pavement, whether by contract or by employees of the City. In case the Commissioner of Streets and Electricity decides that such work or any part thereof shall be performed by contract, it shall be done in accordance

with a plan to be submitted by him and approved by the City

Council. ^{from this appropriation} Amendments have to be made in accordance with the

general policy established by the City Council in connection

with street repairs and maintenance as follows:

"* * *

"(5) Expenditures for the above purposes to be as follows:

"For the employment of the following for such period or periods as needed at rates designated (see Section 8 of this ordinance):

"* * *

"Brick Pavers at \$12.00per day

"* * *

"Total for Pavement Improvement and Repairs...\$1,545,000.00"
(Italics ours.)

Section 8 of said annual appropriation bill of the City of Chicago for the year 1934 provided as follows:

"Section 8. In all cases where salary and wage items are separately appropriated for individual officers or employes in this ordinance, the amount appropriated for each such separate salary and wage item is the amount extended under the heading 'Amounts Appropriated.' Where appropriations under which any of the officers or employes authorized to be paid or compensated at an annual, monthly or weekly rate appear in this ordinance without extension of the several salary or wage items under the heading 'Amounts Appropriated,' the amount authorized by this ordinance for each such office or position as the appropriation therefor shall be the rate named less an amount equal to the proportionate compensation at such rate for the number of days to be deducted for each month or proportionately for each week, as provided in this section.

"Where appropriations are made for groups of officers or employes working on an annual or monthly or weekly basis the total amount appropriated for the entire group is the amount

with street repairs and maintenance as follows:

"(5) Expenditures for the above purposes to be as

follows:

"For the employment of the following for such period or periods as needed at rates designated (see Section 8 of this

ordinance):

"Brick Pavers at \$12.00 per day

"Total for Pavement Improvement and Repairs...\$48,000.00"

(Italics ours.)

Section 8 of said annual appropriation bill of the City of Chicago for the year 1934 provided as follows:

"Section 8. In all cases where salary and wage items are separately appropriated for individual officers or employees in this ordinance, the amount appropriated for each such separate salary and wage item is the amount extended under the heading 'Amounts Appropriated.' Where appropriations under which any of the officers or employees are authorized to be paid or compensated at an annual, monthly or weekly rate appear in this ordinance without extension of the several salary or wage items under the heading 'Amounts Appropriated,' the amount authorized by this ordinance for each such office or position as the appropriation therefor shall be the rate named less an amount equal to the proportionate compensation at such rate for the number of days to be deducted for each month or proportionately for each week, as provided in this section.

"Where appropriations are made for groups of officers or employees working on an annual or monthly or weekly basis the total amount appropriated for the entire group is the amount

appearing at the end of the item under the heading 'Amounts Appropriated.' In the case of officers and employes so grouped, the item of appropriation has been determined on the basis of the authorized rate of compensation computed for the year for each office or position of such group less an amount equal to the proportionate compensation at such rate for the number of days to be deducted for each month or proportionately for each week as provided in this section, notwithstanding that such item of appropriation is less than the arithmetical total secured by adding together the net salaries or wages for all members of the group determined in the manner set forth (the difference between such arithmetical total and the item of appropriation being accounted for by the difference between the amount necessary for the employment of the maximum number of officers and employes authorized during the year 1934 and the amount available for the employment of the number of officers and employes needed from time to time during such year).

"In the case of officers and employes of the Police Department constituting the police force of the city, and of the Fire Department constituting the uniformed service thereof, and of the Municipal Court and of the Clerk of the Municipal Court and of the Bailiff of the Municipal Court, the item of appropriation has been determined by taking the rate of compensation computed for the year for each office or position and deducting therefrom an amount equal to the proportionate compensation at such rate for fifty-two days, distributed equally, as nearly as may be, to each month of the year 1934.

"In the case of officers or employes whose authorized rate of compensation on an annual basis is \$1,500 or less, and on a monthly basis \$125 or less, such items of appropriation have been determined by deducting from such authorized rates of compensation the amounts in accordance with the following table,

appearing at the end of the item under the heading 'Appropriated.' In the case of officers and employees as groups, the item of appropriation has been determined on the basis of the authorized rate of compensation computed for the year for each office or position of such group less an amount equal to the proportionate compensation at such rate for the number of days as he deducted for each month or proportionately for each week as provided in this section, notwithstanding that such item of appropriation is less than the arithmetical total secured by adding together the net salaries or wages for all members of the group determined in the manner set forth (the difference between such arithmetical total and the item of appropriation being accounted for by the difference between the amount necessary for the employment of the maximum number of officers and employees authorized during the year 1934 and the amount available for the employment of the number of officers and employees needed from time to time during such year).

"In the case of officers and employees of the Police Department constituting the police force of the city, and of the Fire Department constituting the uniformed service thereof, and of the Municipal Court and of the Clerk of the Municipal Court and of the Bailiff of the Municipal Court, the item of appropriation has been determined by taking the rate of compensation computed for the year for each office or position and deducting therefrom an amount equal to the proportionate compensation at such rate for fifty-two days, distributed equally, as nearly as may be, to each month of the year 1934.

"In the case of officers or employees whose authorized rate of compensation on an annual basis is \$1,500 or less, and on a monthly basis \$125 or less, such items of appropriation have been determined by deducting from such authorized rates of compensation the amounts in accordance with the following table,

such amounts deducted to be for days or parts of days comprising Sundays, Saturday afternoons and such holidays as are fixed by ordinance or by action of the City Council, distributed equally, as nearly as may be, to each month of the year 1934.

"Authorized		Maintenance Included		Without Maintenance	
Rate of Compensation (Annual)	Amount Deducted	Amount Appropriated	Amount Deducted	Amount Appropriated	
\$ 300.00	. . . .	\$ 300.00	. . . .	\$ 300.00	
500.00	. . . .	500.00	. . . .	500.00	
570.00	. . . .	570.00	. . . .	570.00	
600.00	. . . .	600.00	. . . .	600.00	
660.00	. . . .	660.00	. . . .	660.00	
720.00	. . . .	720.00	. . . .	720.00	
780.00	. . . .	780.00	. . . .	780.00	
840.00	. . . .	840.00	. . . .	840.00	
900.00	\$ 60.00	840.00	. . . .	900.00	
960.00	120.00	840.00	. . . .	960.00	
1,000.00	160.00	840.00	. . . .	1,000.00	
1,020.00	180.00	840.00	. . . .	1,020.00	
1,080.00	230.79	849.21	. . . .	1,080.00	
1,140.00	243.62	896.38	. . . .	1,140.00	
1,200.00	256.44	943.56	. . . .	1,200.00	
1,260.00	269.26	990.74	\$ 60.00	1,200.00	
1,320.00	282.08	1,037.92	120.00	1,200.00	
1,380.00	294.90	1,085.10	180.00	1,200.00	
1,440.00	307.73	1,132.27	240.00	1,200.00	
1,500.00	320.55	1,179.45	300.00	1,200.00	

[a] "In the case of all other officers and employes, the item of appropriation has been determined by taking the rate of compensation computed for the year for each office or position and deducting therefrom an amount equal to the proportionate compensation at such rate for seventy-eight days, distributed equally, as nearly as may be, to each month of the year 1934 (the amounts thus deducted being on account of Sundays, Saturday afternoons and such holidays as are fixed by ordinance or by action of the City Council). In the case of such officers and employes as work six days per week, of which one may be Sunday, such item has been determined by taking the rate of compensation computed for the year for each such office or position and deducting therefrom an amount equal to the proportionate compensation at such rate for seventy-eight days distributed equally, as nearly as may be, to each month

such amounts deducted to be for days or parts of days comprising Sundays, Saturday afternoons and such holidays as are fixed by ordinance or by action of the City Council, distributed equally, as nearly as may be, to each month of the year 1934.

"Authorized Maintenance Included Without Maintenance

Rate of Compensation (Annual)	Amount Deducted	Amount Appropriated	Amount Deducted	Amount Appropriated
\$ 300.00	.	300.00	.	300.00
500.00	.	500.00	.	500.00
570.00	.	570.00	.	570.00
600.00	.	600.00	.	600.00
650.00	.	650.00	.	650.00
720.00	.	720.00	.	720.00
780.00	.	780.00	.	780.00
840.00	.	840.00	.	840.00
900.00	60.00	840.00	.	840.00
950.00	120.00	840.00	.	840.00
1,000.00	150.00	840.00	.	840.00
1,050.00	180.00	840.00	.	840.00
1,080.00	230.79	849.21	.	849.21
1,140.00	243.62	896.38	.	896.38
1,200.00	275.44	923.56	.	923.56
1,250.00	299.25	950.74	50.00	900.74
1,320.00	282.08	1,027.92	150.00	1,100.00
1,380.00	294.90	1,087.10	180.00	1,200.00
1,440.00	307.73	1,132.27	240.00	1,300.00
1,500.00	320.55	1,179.45	300.00	1,400.00

[a] "In the case of all other officers and employees, the rate of

of appropriation has been determined by taking the rate of com-

pensation computed for the year for each office or position and

deducting therefrom an amount equal to the proportionate compen-

sation at such rate for seventy-eight days, distributed equally,

as nearly as may be, to each month of the year 1934 (the amounts

thus deducted being on account of Sundays, Saturday afternoons

and such holidays as are fixed by ordinance or by action of the

City Council). In the case of such officers and employees as work

six days per week, of which one may be Sunday, such item has been

determined by taking the rate of compensation computed for the year

for each such office or position and deducting therefrom an amount

equal to the proportionate compensation at such rate for seventy-

eight days distributed equally, as nearly as may be, to each month

of the year 1934." (*Italics ours.*)

For each of the years in question subsequent to 1934 the appropriation was made substantially in the same manner as it was made in the 1934 annual appropriation bill and in each of the said subsequent years the annual appropriation bill contained a Section 8 which was substantially identical with the Section 8 of the 1934 annual appropriation bill.

In People ex rel. Mulvey v. Chicago, 292 Ill. App. 589 (leave to appeal denied by Supreme Court, 292 Ill. App. xvii), the case was brought by many thousands of employees of the City of Chicago employed in various departments of the City, and the claims involved the annual appropriation bills for the years 1932 to 1935, inclusive. There we held that "the annual appropriation bills fixed the salaries of the plaintiffs employed by the City in its corporate capacity at the amounts actually appropriated." (p. 608) There the petitioners contended that their salaries were fixed in the said annual appropriations bills not at the amounts actually appropriated but at the base figures, which figures, it appeared, were the same as the amounts of salaries appropriated for the offices prior to 1932. We held that neither law, reason nor custom supported the contention and that the salaries of the petitioners were fixed at the amounts actually appropriated; that the specified amounts for salaries and wages were not the amounts actually appropriated but that such figures were simply base figures from which the actual appropriation was arrived at by the method of computations set forth in Sections 8 of the ordinances. But relators in the instant case insist that the ruling in the Mulvey case is not applicable because "the reduction ordinance included only employees working on an annual, monthly or weekly basis, and did not include employees working on a per diem basis;" that relators were working on a per diem basis. We cannot agree with relators' contention that the reduction ordinance

of the year 1934." (Italics ours.)

For each of the years in question antecedent to 1934 the appropriation was made substantially in the same manner as it was made in the 1934 annual appropriation bill and in each of the said antecedent years the annual appropriation bill contained a section 8 which was substantially identical with the section 8 of the 1934 annual appropriation bill.

In People ex rel. Mulvey v. Chicago, 292 Ill. App. 529

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did not apply to them. Note the language of the appropriation bill that we have italicized:

"(5) Expenditures for the above purposes to be as follows:

"For the employment of the following for such period or periods as needed at rates designated (see Section 8 of this ordinance):

"* * *

"Brick Pavers at \$12.00 per day

"* * *

"Total for Pavement Improvement and Repairs \$4,545,000.00"

(Italics ours.)

It seems clear, in our judgment, that the ordinance intended that Section 8 should apply to brick pavers, but relators contend that "the proper construction of Section 8 excludes per diem employees from its provisions." We cannot agree with this contention. The paragraph of Section 8 designated "[a]", supra, is, in our judgment, broad enough to include the position filled by the relators. The brick pavers were paid \$12 per day prior to 1933, and we are satisfied that the words "Brick Pavers at \$12.00 per day" in the appropriation bills did not fix the salary for that position but \$12 was merely a base/^{figure} from which the salary was computed pursuant to the provisions of Section 8 of the appropriation ordinance.

Respondents contend that the intention of the city council must be determined from the language of the ordinances and that the trial court erred in admitting and considering oral testimony in construing the appropriation bills. It appears that a witness who occupied the position of Chief of Staff of the Committee on Finance of the city council was allowed to testify that in his opinion it was not the intention of the council in the appropriation ordinances to reduce the appropriation of per diem employees; that in his opinion the ordinance intended ~~that~~ the brick pavers

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"* * *

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"* * *

"Total for Pavement Improvement and Repairs \$4,945,000.00

(Italics ours.)

It seems clear, in our judgment, that the ordinance intended that Section 8 should apply to brick pavers, but relators contend that "the proper construction of Section 8 excludes per diem employees from its provisions." We cannot agree with this contention. The paragraph of Section 8 designated "[a]", namely, as in our judgment, broad enough to include the position filled by the relators. The brick pavers were paid \$12 per day prior to 1932, and we are satisfied that the words "brick pavers at \$12.00 per day" in the appropriation bills did not fix the salary for that position but ^{figure} \$12 was merely a base from which the salary was computed pursuant to the provisions of Section 8 of the appropriation ordinance.

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were to receive \$12 per day. The relators agree that the evidence in question was improper and incompetent, but they contend respondents are responsible for the introduction of the evidence; respondents contend that relators are responsible.

In People v. Chicago Rys. Co., 270 Ill. 87, 105, 106, the court said:

"We have held that the rules for the construction of an ordinance are the same as those applied in the construction of a statute. (People v. Hummel, 215 Ill. 43; People v. Mohr, 252 id. 160.) It is a primary rule in the interpretation and construction of a statute that the intention of the legislature is to be ascertained and given effect. (People v. Price, 257 Ill. 587.) This rule does not, however, permit the courts to consider statements made by the author of a bill or by those interested in its passage, or by members of the legislature adopting the bill, showing the meaning or effect of the language used in the bill as understood by the person or persons making such statements. Thus, in Belleville and Illinoistown Railroad Co. v. Gregory, 15 Ill. 20, it was said: 'Nor can the presumed or even well known views of all the members of the legislature be allowed to repeal an express provision of a law or to control its construction. The law, alone, can speak the legislative will. When the courts shall be driven to the lobbies of the legislature to learn the sentiments of the members, for the purpose of construing the laws, a new rule of construction will have been adopted.' Again, in Eddy v. Morgan, 216 Ill. 437, we said: 'While journals and proceedings of the legislature are sometimes looked to in an endeavor to ascertain a proper construction of the statute, so that the court may have before it what is authentic that surrounded the enactment of the law, we are aware of no authority, and none has been pointed out, where the action of the lobby or the opinion of the legislators as individuals have been taken into account. In fact, we understand the rule to be otherwise and that

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such matters are inadmissible.' In United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, the United States Supreme Court, in considering this subject, said: 'There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. * * * The reason is, that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it, by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.'

It would be a dangerous practice to permit a trial judge to consider such evidence in a case like the instant one.

Respondents contend that "the petitioners have been guilty of such laches as bars their claims even if they were valid;" that "the plaintiffs in the case at bar have been guilty of precisely the same inactivity of which the plaintiffs in the Mulvey case were guilty only to a greater extent in that the plaintiffs in the case at bar did not demand payment of their supposed claims until more than two years later than the first of the suits filed in the Mulvey case. There the first suit was filed on October 11, 1935 (see page 594 of Volume 292 Ill. App.). In the case at bar demand was made on January 2, 1938, and suit was not commenced until December 31, 1938." The relators contend that they should not be held to be guilty of laches because they waited until it was evident that the respondents were abundantly able to pay them the balance due on their salaries, and that the record does not show that the respondents "have been unduly prejudiced or damaged in any way by any delay

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 It would be a dangerous practice to permit a trial judge to
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 Respondents contend that "the petitioners have been guilty
 of such laches as bars their claims even if they were valid;" that
 "the plaintiffs in the case at bar have been guilty of precisely
 the same inactivity of which the plaintiffs in the Wiley case were
 guilty only to a greater extent in that the plaintiffs in the case
 at bar did not demand payment of their supposed claims until more
 than two years later than the first of the suits filed in the
Wiley case. There the first suit was filed on October 11, 1937
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 was made on January 2, 1938, and suit was not commenced until
 December 31, 1938." The relators contend that they should not be
 held to be guilty of laches because they waited until it was evident
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 on their salaries, and that the record does not show that the respon-
 dents "have been unduly prejudiced or damaged in any way by any delay

on the part of the plaintiffs in instituting this suit."

How dilatory the relators were in asserting their claims is forcibly illustrated by the fact that their claims for the year 1933 were barred by the Statute of Limitations. The instant suit was not filed until December 31, 1938. The argument of the relators that the City was not damaged by the delay in asserting their claims is without merit. If relators had made the claim, now urged, when the 1933 appropriation bill was passed, the city council could have exercised its power to so reduce the salaries of its employees, including relators, in 1934, 1935 and 1936, as to fully protect the City against any loss it might sustain if the relators' claims under the 1933 appropriation bill were held valid. The relators in the instant case were guilty of greater laches than were the relators in the Mulvey case. If the relators in the Mulvey case were not entitled to a writ of mandamus we know of no good reason why the relators in the instant case are entitled to one. In the Mulvey case we stated (p. 611): "While it is regrettable that the extremely bad financial condition of the City, due to the great depression, necessitated reductions in the salaries of the plaintiffs, it is a matter of common knowledge that during the same period practically all employees in the United States sustained reductions in their salaries or wages. Millions of employees lost their positions, and a very great number of these were forced to go upon relief to obtain support for their families and themselves. Millions are still unemployed and on relief. Despite the adverse conditions that confronted the City it retained in its employ all of the plaintiffs and those engaged in like employment, and it asserts its willingness and hope to restore the former salaries as soon as its financial condition will permit it to do so. We are constrained to believe that the instant claims were the result of an afterthought." What we there said applies with equal force to the instant case.

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their claims is without merit. If relators had made the claim,

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council could have exercised its power to so reduce the salaries

of its employees, including relators, in 1934, 1935 and 1936, as

to fully protect the City against any loss it might sustain if

the relators' claims under the 1933 appropriation bill were held

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and it asserts its willingness and hope to restore the former

salaries as soon as its financial condition will permit it to do so.

We are constrained to believe that the instant claims were the

result of an afterthought." What we there said applies with equal

force to the instant case.

The judgment order of the Superior court of Cook county is reversed and the cause is remanded with directions to dismiss the petition.

JUDGMENT ORDER REVERSED,
AND CAUSE REMANDED WITH
DIRECTIONS TO DISMISS
THE PETITION.

Sullivan, P. J., and Friend, J., concur.

The judgment order of the Superior Court of Cook County is reversed and the cause is remanded with directions to dismiss the petition.

JUDGMENT ORDER REVERSED,
AND CAUSE REMANDED WITH
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THE PETITION.

Sullivan, P. J., and Friend, J., concur.

41774

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee,

v.

PERSONAL HOME MORTGAGE COMPANY,
a corporation,

Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant's motion to dismiss plaintiff's complaint on the ground that it failed to state a valid cause of action was overruled by the trial court upon plaintiff's motion. Defendant elected to stand upon the motion and judgment was entered in favor of plaintiff and against defendant in the sum of \$1,447.42. Defendant appeals.

The sole question before us is whether the complaint states a cause of action. It alleges:

"2. That on or about May 19, 1931, it ^[plaintiff] purchased from the Chicago Trust Company a certain mortgage note in the sum of Twelve Thousand Five Hundred Dollars, together with the trust deed securing same, signed by Otte Westergaard and Elsie Westergaard, his wife.

"3. That at the time of the purchase of said mortgage note and trust deed, the premises conveyed by the trust deed known as 917 Fair Oaks Avenue, Oak Park, Illinois, were subject to certain unpaid taxes for the years 1928 and 1929 and prior to the consummation of the purchase of said loan by plaintiff, the owner of said premises, Otte Westergaard, had arranged for a second mortgage loan to be made by the defendant, Personal Home Mortgage Company, a corporation, in the sum of Three Thousand Dollars; that a part of the proceeds of said Three Thousand Dollar mortgage were to be used for the payment of the unpaid taxes on said premises above set forth.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee,

v.

PERSONAL HOME MORTGAGE COMPANY,
a corporation,

Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

MR. JUSTICE SEANAN DELIVERED THE OPINION OF THE COURT.

Defendant's motion to dismiss plaintiff's complaint on the ground that it failed to state a valid cause of action was overruled by the trial court upon plaintiff's motion. Defendant elected to stand upon the motion and judgment was entered in favor of plaintiff and against defendant in the sum of \$1,447.44. Defendant appeals.

The sole question before us is whether the complaint states a cause of action. It alleges:

- "1. That on or about May 19, 1931, it purchased from the Chicago Trust Company a certain mortgage note in the sum of Twelve Thousand Five Hundred Dollars, together with the trust deed securing same, signed by Otto Westergaard and Elsie Westergaard, his wife.
- "2. That at the time of the purchase of said mortgage note and trust deed, the premises conveyed by the trust deed known as 917 Fair Oaks Avenue, Oak Park, Illinois, were subject to certain unpaid taxes for the years 1928 and 1929 and prior to the completion of the purchase of said loan by plaintiff, the owner of said premises, Otto Westergaard, had arranged for a second mortgage loan to be made by the defendant, Personal Home Mortgage Company, a corporation, in the sum of Three Thousand Dollars; that a part of the proceeds of said Three Thousand Dollar mortgage were to be used for the payment of the unpaid taxes on said premises above

"4. That the Chicago Trust Company inquired of the defendant, Personal Home Mortgage Company whether or not said Otte Westergaard had made provisions for the payment of the unpaid taxes above set forth in connection with said property; that on or about May 19, 1931, the Chicago Trust Company was advised by defendant that part of the proceeds of said second mortgage loan were to remain with the defendant to cover taxes for the years 1928, 1929 and 1930; that the defendant, Personal Home Mortgage Company, wrote to the Chicago Trust Company on May 20, 1931 with reference to the payment of said taxes, a certain letter in words and figures as follows, to-wit:

"'PERSONAL
HOME MORTGAGE COMPANY
108 WEST MADISON STREET
CHICAGO

"'May 20, 1931

"'Chicago Trust Company
"'81 West Monroe Street
"'Chicago, Ill.

"'Attention: Mr. Leon G. Wolfe
"'In re: Otte Westergaard et al.
"'917 Fair Oak Avenue
"'Oak Park, Illinois

"'Gentlemen:

"'In accordance with your request, we hereby wish to inform you that we are holding a deposit of \$966.18 toward payment of the 1928, 1929 and 1930 general taxes in connection with a second mortgage loan which we made on the Westergaard property. In addition to this deposit we hold Mr. Westergaard's check in amount of \$235.00 dated June 6, 1931, the proceeds of which will also be held as a reserve for taxes.

"'Very truly yours,

"'Freda Rockenhauser.'

"5. That thereafter Otte Westergaard was unable to keep up the payment on the first mortgage owned by plaintiff and on the

"4. That the Chicago Trust Company insured of the defendant, Personal Home Mortgage Company whether or not said Otte Westergaard had made provisions for the payment of the unpaid taxes above set forth in connection with said property; that on or about May 12, 1931, the Chicago Trust Company was advised by defendant that part of the proceeds of said second mortgage loan were to remain with the defendant to cover taxes for the years 1928, 1929 and 1930; that the defendant, Personal Home Mortgage Company, wrote to the Chicago Trust Company on May 20, 1931 with reference to the payment of said taxes, a certain letter in words and figures as follows, to-wit:

"PERSONAL
HOME MORTGAGE COMPANY
108 WEST MADISON STREET
CHICAGO

"May 20, 1931

"Chicago Trust Company
181 West Monroe Street
Chicago, Ill.

"Attention: Mr. Leon G. Polie
"In re: Otte Westergaard et al.
"1917 West Oak Avenue
"Oak Park, Illinois

"Gentlemen:

"In accordance with your request, we hereby wish to inform you that we are holding a deposit of \$666.18 toward payment of the 1928, 1929 and 1930 general taxes in connection with a second mortgage loan which we made on the Westergaard property. In addition to this deposit we hold Mr. Westergaard's check in amount of \$235.00 dated June 2, 1931, the proceeds of which will also be held as a reserve for taxes.

"Very truly yours,

"Trade Representative."

"5. That thereafter Otte Westergaard was unable to keep up the payment on the first mortgage owned by defendant and on the

second mortgage owned by defendant, that he was unable to pay the taxes as required under the terms of the mortgage, and that he was unable to comply with the other provisions of said mortgages; that he was pressed for payment of his second mortgage by the defendant and that thereafter on August 7, 1933, said Otte Westergaard wrote the defendant, Personal Home Mortgage Company a certain letter in words and figures as follows:

"* * * However, I can see no reason why you should be so worried about this, as you have enough money in escrow to take care of the balance and while I had hoped this money should be in your possession, ready to pay the taxes, I am now getting to believe that it would be better to apply this money on the balance of the mortgage and take a chance with the taxes, as I hardly believe there will be any tax sales under the present conditions. Kindly apply the escrow money on my note, so that I may be relieved from this worry.

"Yours very truly,

"Otte Westergaard."

"6. That thereafter on November 24, 1936 pursuant to instructions and direction from Otte Westergaard, the defendant, Personal Home Mortgage Company applied the sum of Twelve Hundred One Dollars and Eighteen Cents which it then and there had in its possession and custody for the payment of taxes for the years 1928, 1929 and 1930, on account of the amount due from Westergaard to Personal Home Mortgage Company under the second mortgage hereinabove referred to; that the amount actually in possession of the defendant on November 24, 1936, the date of said application of said funds, amount to \$1,319.51, computed as follows: the sum of Nine Hundred Sixty-Six Dollars and Eighteen Cents withheld from the second mortgage at the time of its execution as aforesaid, plus the sum of Two Hundred Thirty Five Dollars which had there-

second mortgage owned by defendant, that he was unable to pay the taxes as required under the terms of the mortgage and that he was unable to comply with the other provisions of said mortgage; that he was pressed for payment of his second mortgage by the defendant and that thereafter on August 7, 1933, said Otto Westergaard wrote the defendant, Personal Home Mortgage Company a certain letter in words and figures as follows:

"*** However, I can see no reason why you should be so worried about this, as you have enough money in escrow to take care of the balance and while I had hoped this money should be in your possession, ready to pay the taxes, I am now getting to believe that it would be better to apply this money on the balance of the mortgage and take a chance with the taxes, as I hardly believe there will be any tax sales under the present conditions. Kindly apply the escrow money on my note, so that I may be relieved from this worry.

"Yours very truly,

"Otto Westergaard."

"6. That thereafter on November 24, 1936 pursuant to instructions and direction from Otto Westergaard, the defendant, Personal Home Mortgage Company applied the sum of Twelve Hundred One Dollars and Fifteen Cents which it then and there had in its possession and custody for the payment of taxes for the years 1929, 1930 and 1931, on account of the amount due from Westergaard to Personal Home Mortgage Company under the second mortgage hereinabove referred to; that the amount actually in possession of the defendant on November 24, 1936, the date of said application of said funds, amount to \$1,197.51, computed as follows: the sum of Nine Hundred Sixty-six Dollars and Fifteen Cents withheld from the second mortgage at the time of its execution as aforesaid, plus the sum of Two Hundred Thirty Five Dollars which had there-

tofore been deposited with the defendant by the said Westergaard for the same purpose, together with interest on said amount to November 24, 1936.

"7. Plaintiff avers that by reason of the foregoing, said sum of Twelve Hundred One Dollars and Eighteen Cents was impressed with a trust for the benefit of plaintiff, that defendant well knew the specific purpose for which said funds were being held by it, that said defendant had no right to apply said funds in payment of any indebtedness owing from Westergaard to defendant even though requested so to do by said Westergaard; that the action of said defendant in making said application of funds as above set forth was in violation of the terms of the trust arrangement under which said funds were being held by the defendant and in violation of the rights of the plaintiff.

"WHEREFORE, plaintiff asks judgment against the defendant in the sum of Twelve Hundred One Dollars and Eighteen Cents, together with interest thereon from November 24, 1936 to date."

Defendant's theory of the case is:

"That the complaint discloses merely a contractual arrangement between Westergaard and the defendant made for the protection of the defendant alone; that the transaction did not constitute a trust; that if there was any trust it was solely for the benefit of defendant and Westergaard, and plaintiff had no interest in it; that there is nothing in the complaint to indicate that defendant is estopped to deny the existence of such a trust; that plaintiff had no right in the monies held by defendant; that the conditions under which defendant held the monies were subject to modification by agreement between Westergaard and defendant; and that defendant acted within its rights and within those of Westergaard in complying with Westergaard's instructions to apply the money on the second mortgage note."

Plaintiff's theory is:

Plaintiff's theory is:

second mortgage note."

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acted within its rights and within those of Westergaard in comply-

by agreement between Westergaard and defendant; and that defendant

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had no right in the monies held by defendant; that the conditions

is estopped to deny the existence of such a trust; that plaintiff

that there is nothing in the complaint to indicate that defendant

of defendant and Westergaard, and plaintiff had no interest in it;

a trust; that if there was any trust it was solely for the benefit

of the defendant alone; that the transaction did not constitute

ment between Westergaard and the defendant made for the protection

"That the complaint discloses merely a contractual arrange-

Defendant's theory of the case is:

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in the sum of twelve hundred One Dollar and fifteen Cents, to-

"WHEREFORE, plaintiff asks judgment against the defendant

of the rights of the plaintiff.

which said funds were being held by the defendant and in violation

forth was in violation of the terms of the trust arrangement under

of said defendant in making said application of funds as above set

even though requested so to do by said Westergaard; that the action

payment of any indebtedness owing from Westergaard to defendant

by it, that said defendant had no right to apply said funds in

knew the specific purpose for which said funds were being held

with a trust for the benefit of plaintiff, that defendant well

sum of Twelve Hundred One Dollar and fifteen Cents was impressed

"7. Plaintiff avers that by reason of the foregoing, said

November 24, 1936.

for the same purpose, together with interest on said amount to

before been deposited with the defendant by the said Westergaard

"That the tax deposit made by Westergaard with defendant was for the sole purpose of paying taxes and not as additional security for the payment of defendant's second mortgage; from the facts as stated in the complaint it appears that the holder of the first mortgage on the Westergaard property had a primary interest in removing the prior lien of the unpaid taxes for the years 1928, 1929 and 1930 and therefore had a direct and substantial interest in the fund deposited for that purpose; that the defendant could not legally use the tax money for any purpose other than that for which it was originally deposited with defendant, particularly after defendant had notified the holder of the first mortgage that it held said moneys for the express purpose of paying said taxes and not as additional security for the payment of the second mortgage.

"Plaintiff had a right to rely on defendant's representations in this regard and did so by purchasing the first mortgage at the time said representations were made. Westergaard and defendant by themselves could not modify or alter this tax payment arrangement. Plaintiff further contends that the application of the tax moneys to defendant's second mortgage was in effect a fraud upon the plaintiff who had a right to rely on defendant's representations that this money was held by defendant for the sole purpose of payment of 1928, 1929 and 1930 taxes; that the defendant is estopped in equity to deny that the tax deposit was held for the benefit of the plaintiff; that the defendant is a constructive trustee of the tax deposit for the benefit of plaintiff and is accountable to the plaintiff to the same extent as any other trustee would be who violates his trust; and that the complaint is sufficient to apprise the defendant of the nature of the transaction, alleges the ultimate facts and gives the defendant full information of the case it is called upon to answer."

"That the tax deposit made by Westergaard with defendant

was for the sole purpose of paying taxes and not as additional security for the payment of defendant's second mortgage; from the facts as stated in the complaint it appears that the holder of the first mortgage on the Westergaard property had a primary interest in removing the prior lien of the unpaid taxes for the years 1928, 1929 and 1930 and therefore had a direct and substantial interest in the fund deposited for that purpose; that the defendant could not legally use the tax money for any purpose other than that for which it was originally deposited with defendant, particularly after defendant had notified the holder of the first mortgage that it held said moneys for the express purpose of paying said taxes and not as additional security for the payment of the second mortgage.

"Plaintiff had a right to rely on defendant's representa-

tions in this regard and did so by purchasing the first mortgage at the time said representations were made. Westergaard and

defendant by themselves could not modify or alter this tax pay-

ment arrangement. Plaintiff further contends that the application

of the tax moneys to defendant's second mortgage was in effect

a fraud upon the plaintiff who had a right to rely on defendant's

representations that this money was held by defendant for the

sole purpose of payment of 1928, 1929 and 1930 taxes; that the

defendant is estopped in equity to deny that the tax deposit was

held for the benefit of the plaintiff; that the defendant is a

constructive trustee of the tax deposit for the benefit of plain-

tiff and is accountable to the plaintiff to the same extent as

any other trustee would be who violates his trust; and that the

complaint is sufficient to apprise the defendant of the nature

of the transaction, alleges the vital facts and gives the

defendant full information of the case it is called upon to

After a careful consideration of the allegations of the complaint we are satisfied that defendant's theory is sound and that the motion of defendant to dismiss the complaint on the ground that it failed to state a cause of action should have been granted by the trial court. We will review, however, the points raised by plaintiff in support of its contention that the judgment should be affirmed:

Plaintiff contends that "the deposit by Westergaard with defendant of moneys for taxes was a contractual relationship between Westergaard and defendant under which plaintiff was a third party beneficiary." The leading case cited by plaintiff in support of its contention is Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252. There the court (pp. 257, 258) laid down the rule that governs us in passing upon the instant contention:

"There is but one question in the case, and that is whether appellee has a right to sue on the contract between Harrison and Wolford and Caldwell & Co. The rule is settled in this State that if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon. This rule has been announced without variation in numerous cases decided by this court. Kinnan v. Hurst Co., 317 Ill. 251; Vial v. Norwich Union Fire Ins. Society, 257 id. 355; Searles v. City of Flora, 225 id. 167; Harts v. Emery, 184 id. 560; Webster v. Fleming, 178 id. 140; Lawrence v. Oglesby, id. 122; Crandall v. Payne, 154 id. 627; Bay v. Williams, 112 id. 91; Dean v. Walker, 107 id. 540; Snell v. Ives, 85 id. 279; Bristow v. Lane, 21 id. 194; Brown v. Strait, 19 id. 88; Eddy v. Roberts, 17 id. 505.

"It is not seriously argued that such is not the rule in

After a careful consideration of the allegations of the complaint we are satisfied that defendant's theory is sound and that the notion of defendant to dismiss the complaint on the ground that it failed to state a cause of action should have been granted by the trial court. We will review, however, the points raised by plaintiff in support of its contention that the judgment should be affirmed:

Plaintiff contends that "the deposit by Westgard with defendant of moneys for taxes was a contractual relationship between Westgard and defendant under which plaintiff was a third party beneficiary." The leading case cited by plaintiff in support of its contention is Garson Fiske Scott & Co. v. Fidelity 346 Ill. 252. There the court (pp. 257, 258) laid down the rule that government as in passing upon the instant contention:

"There is but one question in the case, and that is whether appellee has a right to sue on the contract between Harrison and Wolford and Caldwell & Co. The rule is settled in this State that if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon. This rule has been announced without variation in numerous cases decided by this court. Winn

v. First Co., 317 Ill. 251; Vine v. Foxworth Union Trust Co., 257 Ill. 255; Charles v. City of Chicago, 252 Ill. 107; Smith v. First, 184 Ill. 260; Wester v. Chicago, 178 Ill. 140; Winn v. Chicago, 154 Ill. 122; Grandall v. Payne, 154 Ill. 607; Pay v. Chicago, 152 Ill. 91; Dean v. Walker, 107 Ill. 140; Smith v. Jones, 82 Ill. 279; Wright v. Jones, 21 Ill. 194; Brown v. Smith, 19 Ill. 88; Idley v. Roberts, 17 Ill. 205.

"It is not seriously argued that such is not the rule in

Illinois, but the argument turns rather on the application of the rule to the construction of the contract. In such a case no opinion in an adjudicated case, even of this court, is controlling unless the language of the contract or the circumstances surrounding the parties are substantially the same, since each case must depend upon the intention of the parties as that intention is to be gleaned from a consideration of all of the contract and the circumstances surrounding the parties at the time of its execution. (Calame v. Paisley, 296 Ill. 618; Street v. Chicago Wharfing Co., 157 id. 605; Bull v. City of Quincy, 155 id. 566; Chicago, Madison and Northern Railroad Co. v. National Elevator Co., 153 id. 70.) The rule is, that the right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed. The liability so appearing can not be extended or enlarged on the ground, alone, that the situation and circumstances of the parties justify or demand further or other liability. Hageman v. Holmes, 179 Ill. 275."

In the foregoing case John H. Harrison and M. J. Wolford entered into a contract with Caldwell & Company, by which the latter was to underwrite and dispose of certain bonds, the funds to be used in the construction and furnishing of the Hotel Wolford, in Danville, Illinois. To quote from the opinion (p. 254): "The hotel company had issued its bonds in the sum of \$700,000 under date of February 13, 1926, and had entered into an agreement with Caldwell & Co. by which the latter was to underwrite and dispose of the bonds, the funds to be used in the construction and furnishing of the hotel. To secure these bonds the hotel company executed and delivered a real estate mortgage on the property and also its chattel mortgage on all furnishings and chattels installed in the hotel. This mortgage and the trust deed ran to the Liberty

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Central Trust Company and one Miller as trustees. In the trust deed the hotel company agreed that it would promptly furnish all moneys necessary to furnish the hotel and would have the same promptly completed and furnished. On November 24, 1926, the hotel company not having sufficient funds to furnish the hotel in accordance with the requirements of the trust deed and Caldwell & Co. having in its custody certain of the proceeds of the sale of the bonds and refusing to make further disbursement of such proceeds until the hotel company had in its possession sufficient funds to furnish the hotel, or until assurances should be given that the furnishings would be installed free of lien or incumbrance, Harrison and Wolford on that day entered into a contract with Caldwell & Co." The contract provided, inter alia, that Harrison and Wolford agreed to promptly pay for certain furnishings of the hotel that were specified in the contract, to be purchased from certain parties named in the contract, "if the hotel company does not do so." (Italics ours.) One of the items of furnishings specified is, "Linens - Carson Pirie Scott & Company, Marshall Field Company \$6,763.25." Carson Pirie Scott & Company furnished goods to the hotel company to the amount of \$3,266.20, and Marshall Field & Company furnished linens to the amount of \$1,321. The articles were delivered to the hotel company and installed in the hotel building and were accepted by the hotel company on December 15, 1926. The terms of the sale were thirty days net, so that payment for the goods became due on January 15, 1927. The hotel company did not pay for the goods and suit was brought by Carson Pirie Scott & Company on the contract. The Supreme court held (p. 261) that "this was an agreement to purchase certain goods from appellee [Carson Pirie Scott & Company] and to pay for them if the hotel company did not;" that (p. 265) appellee "is a donee beneficiary under this contract. It is directly, and not incidentally,

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benefited thereby. By the contract it was given not only the right to be paid for the goods, but the right, in the first instance, to furnish them," and that it had the right to sue under the contract. It would ^{hardly} seem necessary to state that that case, under the facts, bears no analogy to the case alleged in the instant complaint. Neither plaintiff nor Chicago Trust Company nor the first mortgage is mentioned in the agreement between Westergaard and defendant and the second mortgage loan had been executed and the deposit made before Chicago Trust Company made the inquiries of defendant and before plaintiff had purchased the first mortgage note. The only reasonable inference that can be drawn from the allegations is that the agreement was not made for the benefit of Chicago Trust Company nor plaintiff. There is no allegation in the complaint that Chicago Trust Company stated to defendant that it was making the inquiries because it was about to make a sale of the first mortgage to plaintiff or anybody else, but it does appear from the allegations that that Company did not even know that an agreement had been entered into between Westergaard and defendant in reference to the payment of taxes until it made the inquiries of defendant. The argument of plaintiff that it appears from the allegations of the complaint that the "deposit agreement contemplated a third party to it" and that plaintiff was the third party, hardly merits serious consideration. Indeed, there is force in defendant's argument that plaintiff's contention that it is a "third party beneficiary" under the deposit agreement is an afterthought; that no such theory was asserted in the complaint; that the claim of plaintiff set up in the complaint was based upon the theory that the deposit "was impressed with a trust for the benefit of plaintiff." Defendant's letter of May 20, 1931, states that it was holding the deposit "toward payment of the 1928, 1929 and 1930 general taxes in connection with a second mortgage loan which we made on the Westergaard property."

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(Italics
ours.) No case has been cited by plaintiff that supports its contention that under the allegations of the complaint it was a third party beneficiary under the deposit agreement. The instant contention of plaintiff is without merit.

In support of plaintiff's next contention, that "the defendant is estopped to deny that the tax deposit was held for the benefit of the plaintiff," counsel for plaintiff are forced to assume facts not alleged in the complaint. To cite a few of the important unwarranted assumptions: Plaintiff assumes that defendant's response to the inquiry of Chicago Trust Company was made on the day of the purchase of the first mortgage by plaintiff. The complaint alleges that on or about May 19, 1931, plaintiff purchased the first mortgage; that on or about that day Chicago Trust Company was advised by defendant respecting the deposit and that on the following day defendant wrote the letter dated May 20, 1931. There is no direct averment that plaintiff purchased the mortgage after defendant had answered the inquiries of Chicago Trust Company; a fortiori, there is no averment that plaintiff knew of the inquiries and the answers thereto before he purchased the mortgage and that he relied upon defendant's representations in purchasing the mortgage. The further assumption by plaintiff that "the arrangements made by Westergaard for the procuring of the first mortgage * * * and the junior mortgage * * * were part of a single transaction," is not warranted by the allegations of the complaint. The only reasonable inference from the allegations is that the first and second mortgages resulted from separate transactions. The complaint does not allege who made the first mortgage, but it does allege that plaintiff purchased from Chicago Trust Company the first mortgage note and trust deed, and that the second mortgage was made by defendant. That the transactions were separate is indicated by the allegations that Chicago Trust Company made the inquiries of defendant after the latter had

Plaintiffs
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purchase of the first mortgage by plaintiff. The complaint alleges

that on or about May 19, 1931, plaintiff purchased the first mort-

gage; that on or about that day Chicago Trust Company was advised

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avowment that plaintiff purchased the mortgage after defendant had

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made the second mortgage loan and after the agreement between defendant and Westergaard had been consummated. Plaintiff's further assumption that "there can be no question that in purchasing the first mortgage the plaintiff relied on the representations of defendant as to the existence of this tax deposit," is not warranted by the allegations of the complaint. To repeat what we have already stated, there is no allegation that plaintiff in purchasing the first mortgage relied on the said representations; indeed, there is no allegation that plaintiff was informed of the representations; nor is there even an allegation that Chicago Trust Company relied upon the said representations. There is no allegation as to the purpose of Chicago Trust Company in making the inquiries of defendant and no allegation as to what the Trust Company stated to defendant when it made the inquiries. In support of the instant contention plaintiff argues that "the representation was made as an inducement to act and with the expectation that it would be acted upon by the Chicago Trust Company, which fact is evidenced by the subsequent sending of the letter. There would have been no purpose in sending such a letter to Chicago Trust Company if the previous representation was not intended to be acted upon; that Chicago Trust Company and plaintiff relied and acted upon the representations and "the subsequent diversion of the fund by defendant resulted in a fraud being perpetrated upon plaintiff." We have heretofore stated that there were no allegations that either Chicago Trust Company or plaintiff relied upon the representations and acted upon them, and so far as can be reasonably inferred from the allegations Chicago Trust Company, engaged in the mortgage business, inquired of defendant, also engaged in that business, "whether or not said Otte Westergaard had made provisions for the payment of the unpaid taxes above set forth in connection with said property," and defendant, apparently as a matter of courtesy, answered the inquiry and gave

made the second mortgage loan and after the agreement between defendant and Westergaard had been consummated, Plaintiff's further assumption that "there can be no question that in purchasing the first mortgage the plaintiff relied on the representations of defendant as to the existence of this tax deposit," is not warranted by the allegations of the complaint. To repeat what we have already stated, there is no allegation that plaintiff in purchasing the first mortgage relied on the said representations; indeed, there is no allegation that plaintiff was informed of the representations; nor is there even an allegation that Chicago Trust Company relied upon the said representations. There is no allegation as to the purpose of Chicago Trust Company in making the inquiries of defendant and no allegation as to what the Trust Company stated to defendant when it made the inquiries. In support of the instant contention plaintiff argues that "the representation was made as an inducement to act and with the expectation that it would be acted upon by the Chicago Trust Company, which fact is evidenced by the subsequent sending of the letter. There would have been no purpose in sending such a letter to Chicago Trust Company if the previous representation was not intended to be acted upon; that Chicago Trust Company and plaintiff relied and acted upon the representations and "the subsequent diversion of the fund by defendant resulted in a fraud being perpetrated upon plaintiff." We have heretofore stated that there were no allegations that either Chicago Trust Company or plaintiff relied upon the representations and acted upon them, and so far as can be reasonably inferred from the allegations Chicago Trust Company, engaged in the mortgage business, induced of defendant, also engaged in that business, "whether or not said Otto Westergaard had made provisions for the payment of the unpaid taxes above set forth in connection with said property," and defendant, apparently as a matter of courtesy, honored the inquiry and gave

the exact facts as to the agreement between it and Westergaard. The complaint does not allege that defendant made any representation that was not consistent with the facts. What would it profit defendant to induce Chicago Trust Company to sell the first mortgage to plaintiff? Plaintiff's case, as made out in the complaint, is not based upon the theory now advanced, but is based upon the theory that defendant, because of the alleged statements made to Chicago Trust Company, had no right to thereafter use the fund save for the payment of the taxes. No case has been cited to us that supports plaintiff's contention that under the allegations of the complaint "the defendant is estopped to deny that the tax deposit was held for the benefit of the plaintiff." Such cases as Dodd v. Rotterman, 330 Ill. 362; Catherwood v. Morris, 360 Ill. 473, and Malloy v. City of Chicago, 369 Ill. 97, cited by plaintiff, have no application, under the facts, to plaintiff's case as alleged in its complaint. We conclude that the allegations of the complaint afford no basis for estoppel.

Plaintiff contends that under the allegations of its complaint a constructive trust existed in favor of plaintiff.

"Constructive trusts are declared and established in two general classes of cases, namely, (1) those cases in which actual fraud is considered as an equitable ground for raising such trust, and (2) those cases in which the existence of a confidential and fiduciary relation, and the subsequent abuse of the confidence reposed, are considered sufficient ground to establish such trust. (Miller v. Miller, 266 Ill. 522.)" (Catherwood v. Morris, 345 Ill. 617, 632, 633.)

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of constructive trust may be referred to what equity denominates fraud, either actual or constructive, including acts or omissions in violation of fiduciary obligations." (Roche v. Roche, 286 Ill. 336, 350, 351. See, also, Neagle v. McMullen, 334 Ill. 168, 175.)

The allegations of the complaint do not show that any fiduciary relationship existed between Chicago Trust Company or plaintiff on the one hand and defendant upon the other, and as we understand plaintiff's argument it does not contend that there was any such relationship. Its position is that under the principles of equitable estoppel and the special circumstances and conditions of the case made out in the complaint defendant is precluded from denying that a constructive trust existed. The leading case cited by plaintiff in support of the instant contention is Anglo-American Sav. & Loan Ass'n v. Campbell, 13 App. D. C. 581. In that case one Lea, having vacant property, for the purpose of improving it entered into a contract with the defendant Association by which the Association agreed to lend money for paying the cost of the improvement, the loan to be secured by a first mortgage on the premises and improvements. The contract provided that the funds loaned should be paid out in the course of the construction of the improvement according to a prescribed schedule. Lea then entered into a number of contracts for materials, one of which was with the plaintiff. There was evidence that Lea told the plaintiff, prior to the execution of the contract between them, of the terms of the loan, and assured plaintiff that he would be paid from its proceeds, and plaintiff testified that he entered into the contract with Lea because of the said representations and assurance. Before the improvement was completed and paid for the money ran short, but the defendant still had in its possession \$3,000 of the proceeds of the loan. Plaintiff attempted to establish that this balance was held by defendant

of constructive trust may be referred to that equity beneficiaries stand, either actual or constructive, including acts or omissions in violation of fiduciary obligations." (Booth v. Booth, 206 Ill. 336, 350, 351. See, also, Booth v. Booth, 204 Ill. 108, 195.)

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in trust, but the court held that there was no trust (p. 599). The court, however, finally concluded that under the special circumstances disclosed by the evidence the principle of equitable estoppel applied, and prevented defendant from denying that a constructive trust was "raised up by those special circumstances and conditions." The "special circumstances and conditions" that were present in that case are not present in the case made out in plaintiff's complaint. In support of its instant contention plaintiff also cites the following cases: Live Stock Exch. v. Roseville State Bank, 249 Ill. App. 44; Clemmer v. Drovers' Nat. Bank, 157 Ill. 206; State Nat. Bank v. Payne, 56 Ill. App. 147; Weir v. Union Trust Co., 188 Mich. 452; Barnes v. Thuet, 116 Ia. 359, 89 N. W. 1085; Northwestern Mutual Sav. & Loan Ass'n v. Kessler, 66 N. D. 737, 268 N. W. 692; First Nat. Bank v. U. S. Fidelity & Guaranty Co., (Or.) 271 Pac. 57. Each of the first three cases cited involves transactions with a bank, and the familiar principle of law was applied that a deposit made by a customer of the bank does not become the bank's property when the bank knows, or, from the course of dealings with the depositor, is bound to know, that a deposit is in reality the fund of another or is a trust fund in the hands of the depositor. In Weir v. Union Trust Co. the court held that a fiduciary relationship existed between the parties. In Barnes v. Thuet the court held that a course of business dealings between two parties constituted an agreement between them that certain funds should be applied in a particular manner; that one of the parties, in the course of the said dealings, had in their possession a certain fund that should have been applied in accordance with the agreement, but they "seemed to think this an opportune time to balance accounts with Lindley [a third party] at the expense of the plaintiff," but the court held that they would not be permitted to thus violate the said agreement to the detriment of the

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State Bank, 249 Ill. App. 441; Oliver v. Weaver, 157
Ill. 206; State Nat. Bank v. Brown, 50 Ill. App. 147; Kell v.
Union Trust Co., 188 Mich. 452; Jones v. Trust, 110 Ia. 399, 99
W. 1085; Northwestern Nat. Bk. v. Loan Assn. v. Bess, 66
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the hands of the depositor. In State v. Union Trust Co., the court
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Barnes v. Trust the court held that a course of business dealings
between two parties constituted an agreement between them that
certain funds should be applied in a particular manner; and one
of the parties, in the course of the said dealings, had in fact
possession a certain fund that should have been applied in accord-
ance with the agreement, but they "seemed to think that an agreement
time to balance accounts with him [the third party] at the expense
of the plaintiff," but the court held that they would not be per-
mitted to thus violate the said agreement in the absence of the

plaintiff, and equity would impress the fund with a constructive trust in favor of the plaintiff. In Northwestern Mutual Sav. & Loan Ass'n v. Kessler the Association made a direct representation to a lumber company that it was lending a certain sum of money to a customer of the lumber company and that if the lumber company would sell lumber to the customer there would "be plenty of money for their material." The lumber company, relying upon the representations of the Association, delivered two loads of lumber to the customer, and the lumber company for the same reason did not perfect a mechanic's lien, which it otherwise would have perfected had it not been for the said representations. Later, the customer and the Association agreed to reduce the amount of the loan, with the result that the lumber company was not paid for some of the lumber. The ~~lower~~ court held that by its representations the Association was estopped to deny that the lumber company had a lien paramount to the lien of the mortgage of the Association. In that case there was a direct transaction between the Association and the lumber company. In First Nat. Bank v. U. S. Fidelity & Guaranty Co. there was an agreement between the parties.

After a careful and patient consideration of the points raised by plaintiff in support of the judgment, we have reached the conclusion that the judgment of the Circuit court of Cook county must be reversed, and it is accordingly so ordered.

JUDGMENT REVERSED.

Sullivan, P. J., and Friend, J., concur.

plaintiff, and equity would impress the trust with a constructive trust in favor of the plaintiff. In Northwestern Lumber Co. v. Loan Ass'n v. Kessler the Association made a direct representation to a lumber company that it was lending a certain sum of money to a customer of the lumber company and that if the lumber company would sell lumber to the customer there would be plenty of money for their material. The lumber company, relying upon the representations of the Association, delivered two loads of lumber to the customer, and the lumber company for the same reason did not perfect a mechanic's lien, which it otherwise would have perfected had it not been for the said representations. Later, the customer and the Association agreed to reduce the amount of the loan, with the result that the lumber company was not paid for some of the lumber. The ~~xxxx~~ court held that by its representations the Association was estopped to deny that the lumber company had a lien paramount to the lien of the mortgage of the Association. In that case there was a direct transaction between the Association and the lumber company. In First Nat. Bank v. Lumber Co. Associates & Guaranty Co. there was an agreement between the parties. After a careful and patient consideration of the points raised by plaintiff in support of the judgment, we have reached the conclusion that the judgment of the Circuit Court of Cook County must be reversed, and it is so accordingly so ordered.

(THE COURT THEREUPON)

Sullivan, P. J., and Friend, J., concur.

41828

ELLA M. BLAND,
(Plaintiff) Appellant,

v.

HERBERT J. BUCHSBAUM et al.,
Defendants.HERBERT J. BUCHSBAUM,
(Defendant) Appellee.APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued at law on a bond executed by defendant Buchsbaum and others by the terms of which defendant guaranteed due performance by him of a contract concurrently entered into between defendant and plaintiff and one Quinn by the terms of which defendant agreed to sell to plaintiff, for \$54,000, a certain six-flat building located at 4313-4315 South Parkway, Chicago. At the time of the execution of the two instruments the said premises, together with certain property adjacent thereto extending along South Parkway, was subject to the lien of a blanket mortgage for \$135,000, which mortgage was then of record. The blanket mortgage was payable in semi-annual installments of \$3,250 and interest, with a final payment of \$92,750 on April 14, 1932. The articles of agreement between plaintiff and Quinn and defendant provided that plaintiff and Quinn should pay the \$54,000 in the following manner: \$10,000 in cash at the time of making the contract, \$250 on October 1, 1925, \$250 on the first day of each and every month thereafter to and including March 1, 1932, and a final payment of \$24,500 on April 14, 1932. A rider was attached to the articles of agreement which provided that defendant would promptly pay the interest and principal on the blanket mortgage when the same became due and would keep the purchasers free and harmless from any loss or damage arising from the nonpayment

41828

ELIA W. BLAND,
(Plaintiff), Appellant,

v.

HERBERT J. BUCHSBAUM et al.,
Defendants.

HERBERT J. BUCHSBAUM,
(Defendant), Appellee.

ALLIANCE COURT
OF CHICAGO

MR. JUSTICE SEAMAN delivered the opinion of the court.

Plaintiff sued at law on a bond executed by defendant Buchsbaum and others by the terms of which defendant guaranteed the performance by him of a contract concerning the sale of certain six-flat building located at 4113-4115 South Parkway, Chicago. At the time of the execution of the two instruments the said premises, together with certain property adjacent thereto extending along South Parkway, was subject to the lien of a blanketed mortgage for \$135,000, which mortgage was then of record. The blanketed mortgage was payable in semi-annual installments of \$3,250 and interest, with a final payment of \$24,500 on April 14, 1932. The articles of agreement between plaintiff and defendant provided that plaintiff and defendant should pay the \$34,000 in the following manner: \$10,000 in cash at the time of making the contract, \$250 on October 1, 1931, \$250 on the first day of each and every month thereafter to and including March 1, 1932, and a final payment of \$24,500 on April 14, 1932. A rider was attached to the articles of agreement which provided that defendant would properly pay the interest and principal on the blanketed mortgage when the same became due and would keep the premises free and harmless from any loss or damage arising from the nonpayment

thereof and would "cause said trust deed to be released at the maturity thereof and at the time of the final payment of the balance due under this contract," in order to protect plaintiff against damages that might arise if the blanket mortgage was foreclosed. The rider further provided that defendant should give a bond in the penal sum of \$88,000 conditioned on defendant's performance of his agreement. At the time of the execution and delivery of the articles of agreement defendant also executed and delivered the bond, which provides for a conveyance, free and clear of all mortgage incumbrance, conditioned upon plaintiff's performance of the covenants undertaken by her under the articles of agreement, and full payment of the purchase price. The initial payment of \$10,000 was paid, and the next day, August 8, 1935, William Quinn assigned his interest in the contract to plaintiff. She made her monthly payments to defendant until March, 1932. At that time she had paid defendant, under the agreement, in principal and interest, more than \$33,000. Defendant made all of the payments that were due under the blanket mortgage until October 14, 1931. His testimony that at that time he arranged with the holder of the blanket mortgage to extend the time for payment of the October installment to April 14, 1932, is not disputed in the evidence, but plaintiff argues that the testimony is not credible. But it is clear that some time prior to April 14, 1932, the owner of the blanket mortgage accepted from defendant \$1,754.37 on account of the October 14, 1931, installment. There is practically no material dispute as to the facts so far stated. There is a sharp conflict in the testimony as to what occurred thereafter. It would be impossible for us to give in detail the entire testimony of the parties as to what occurred thereafter. It is sufficient to say that plaintiff claimed that in March, 1932,

thereof and would "cause said trust deed to be released at the maturity thereof and at the time of the final payment of the balance due under this contract," in order to protect plaintiff against damages that might arise if the blanket mortgage was foreclosed. The rider further provided that defendant should give a bond in the penal sum of \$88,000 conditioned on defendant's performance of his agreement. At the time of the execution and delivery of the articles of agreement defendant also executed and delivered the bond, which provides for a conveyance, true and clear of all mortgage incumbrances, conditioned upon plaintiff's performance of the covenants undertaken by her under the articles of agreement, and full payment of the purchase price. The initial payment of \$10,000 was paid, and the next day, August 8, 1932, William Quinn assigned his interest in the contract to plaintiff. She made her monthly payments to defendant until March, 1932. At that time she had paid defendant, under the agreement, in principal and interest, more than \$33,000. Defendant made all of the payments that were due under the blanket mortgage until October 14, 1931. His testimony that at that time he arranged with the holder of the blanket mortgage to extend the time for payment of the October installment to April 14, 1932, is not disputed in the evidence, but plaintiff argues that the testimony is not credible. But it is clear that some time prior to April 14, 1932, the owner of the blanket mortgage asserted from defendant \$17,419.79 on account of the October 14, 1931, installment. There is practically no material dispute as to the facts so far stated. There is a sharp conflict in the testimony as to what occurred thereafter. It would be impossible for us to give in detail the entire testimony of the parties as to what occurred thereafter. It is sufficient to say that plaintiff claimed that in March, 1932,

defendant refused to take any more money from her on the contract and told her he had lost everything, more than \$300,000; that he had nothing more to do with the property and she would have to deal with Mr. Hefferan, who represented the owner of the blanket mortgage, or she would have to raise \$135,000 to save her property; that she was ready, able and willing to make the payments due under her contract for the months of March and April, 1932, "if defendant would free the premises from the blanket mortgage and convey same to her according to his covenants." In support of her claim that she was ready, able and willing to meet the ^{payment and the} March ~~payment~~ of \$24,500 in April, she testified that she and her sisters "among them" had about \$10,000 in cash in three banks, and that Dan Gaines, an automobile dealer, had promised to furnish the balance needed and take a mortgage for security, if plaintiff by the payment of the balance due on her contract could get clear title to the property. Defendant testified that plaintiff never tendered to him the March payment nor the \$24,500 payment due in April; that in February, 1932, in his office, plaintiff stated that she would be unable to pay the \$24,500 in April and was having difficulty in meeting the monthly payments of \$250. Plaintiff denied making this statement. Defendant further testified that in March, 1932, plaintiff came to defendant's office for advice; that she stated that she could not pay the \$24,500; that he told her that if she could not raise the money the only thing that he could do was to call Mr. Hefferan, the attorney for the mortgage holder, and arrange a conference with Hefferan and plaintiff's attorney; that he then called Mr. Hefferan and arranged for a conference; that the conference was held at the office of Hefferan, at which time plaintiff was represented by her attorney, Mr. Basse; that Hefferan then and there agreed to continue to take the monthly payments of \$250 from plaintiff if

defendant refused to take any more money from her on the contract and told her he had lost everything, more than \$30,000; that he had nothing more to do with the property and she would have to deal with Mr. Heffernan, who represented the owner of the blanket mortgage, or she would have to raise \$13,000 to save her property; that she was ready, able and willing to make the payments due under her contract for the months of March and April, 1932, if defendant would free the premises from the blanket mortgage and convey same to her according to his covenants, "in support of her claim that payment and the first payment of \$24,500 she was ready, able and willing to meet the first payment of \$24,500 in April, she testified that she and her sisters "among them" had about \$10,000 in cash in three banks, and that Dan Gahnes, an automobile dealer, had promised to furnish the balance needed and take a mortgage for security, if plaintiff by the payment of the balance due on her contract could get clear title to the property. Defendant testified that plaintiff never tendered to him the first payment nor the \$24,500 payment due in April; that in February, 1932, in his office, plaintiff stated that she would be unable to pay the \$24,500 in April and was having difficulty in meeting the monthly payments of \$250. Plaintiff denied making this statement. Defendant further testified that in March, 1932, plaintiff came to defendant's office for advice; that she stated that she could not pay the \$24,500; that he told her that if she could not raise the money the only thing that he could do was to call Mr. Heffernan, the attorney for the mortgage holder, and arrange a conference with Heffernan and plaintiff's attorney; that he then called Mr. Heffernan and arranged for a conference; that the conference was held in the office of Heffernan, at which time plaintiff was represented by her attorney, Mr. Basse; that Heffernan then and there agreed to continue to take the monthly payments of \$250 from plaintiff if

she would assign the rents. Plaintiff denies making the said statement in defendant's office. She admitted that there was a meeting in Hefferan's office between defendant, Hefferan and her attorney, Mr. Basse, but denied, at first, that she was present. She testified that Hefferan promised her that if she let her property go into temporary receivership all the money collected from the rents would go to Hefferan; that she expected that the temporary receivership would last ninety days and that the property would then go to her; that "I turned over my property in a conversation with Mr. Basse, Mr. Buchsbaum and Mr. Hefferan." She further testified that she brought suit against Hefferan because of his statements in reference to the receivership and that she testified in the trial of that suit. Questioned by defendant's attorney, the following then occurred: "Q. And do you recall this question being asked of you: 'Mr. Cohen: Will you state to the court the conversation? A. When I entered Mr. Hefferan's office he asked me was I Mrs. Ella Bland, I told him yes, he said, "I understand you are interested in that property or part of the property, 4313 South Parkway." I said, "Yes." He said, "I am the trustee and sole agent for the beneficiary, Kipley."' Do you remember making that statement? A. Yes. Q. Do you wish to change your testimony to the effect you never talked to Mr. Hefferan? A. You asked did I make any negotiations with Mr. Hefferan. Q. Your answer is you did not? A. No, not figures or anything of that kind. Q. Do you remember this further answer: 'He said, "I am sorry, you bought it, you should have bought it from me" he said, after looking over the contract, "I will tell you what you do, if you keep up that contract and make your payments as you have given them - * * * keep up your contract, insurance and improvements on the property and I will assure you at that time when the deed is due you will not lose the property," and I accepted it and was

she would assign the rents. Plaintiff denied making the said statement in defendant's office. She admitted that there was a meeting in Hoffer's office between defendant, Hoffer and her attorney, Mr. Bass, but denied, at first, that she was present. She testified that Hoffer promised her that if she let her property go into temporary receivership all the money collected from the rents would go to Hoffer; that she expected that the temporary receivership would last ninety days and that the property would then go to her; that "I turned over my property in a conversation with Mr. Bass, Mr. Hochbaum and Mr. Hoffer." She further testified that she brought suit against Hoffer because of his statements in reference to the receivership and that she testified in the trial of that suit. Questioned by defendant's attorney, the following then occurred: "Q. And do you recall this question being asked of you: 'Mr. Cohen: Will you state to the court the conversations? A. When I entered Mr. Hoffer's office he asked me was I Mrs. M. M. I said, I told him yes, he said, 'I understand you are interested in that property or part of the property, 4313 South Parkway.' I said, 'Yes.' He said, 'I am the trustee and sole agent for the beneficiary, M. M.' He then remember making that statement? A. Yes. Q. Do you wish to change your testimony to the effect you never talked to Mr. Hoffer? A. You asked did I make any negotiations with Mr. Hoffer. Q. Your answer is you did not? A. No, not figures or anything of that kind. Q. Do you remember this further answer: 'He said, 'I am sorry, you bought it, you should have bought it from me' he said, after looking over the contract, 'I will tell you what you do, if you keep up that contract and make your payments as you have given them - * * * keep up your contract, in time and in payments on the property and I will return you at that time what the deed is due you will not lose the property,' and I accepted it and was

very glad.' Do you remember making that answer? A. Yes." It is clear that Hefferan desired to avoid foreclosure proceedings and to allow plaintiff and defendant time in which to meet their obligations, but it is equally clear that neither defendant nor plaintiff, at the time, desired to save their property if saving it required meeting their obligations. The owner of the blanket mortgage could not get her money back, nor any considerable part of it, by foreclosure proceedings. Plaintiff further testified that on several occasions, particularly in December, 1931, she was notified by Mr. Hefferan that defendant was not making payments of principal and interest on the blanket mortgage; that every time she received such notice she called defendant and he told her not to worry, to just make her payments on her contract with him and that she was fully protected by her bond. Defendant denied making these statements. Plaintiff did not see fit to call Attorney Basse as a witness.

Judge Prystalski, who tried the case, gave a great deal of time to the hearing and consideration of the evidence. In his opinion deciding the case he called attention to the fact that the depth of the great depression was in 1932 and that \$24,500, in April, 1932, "was an awful lot of money." He also called attention to the fact that plaintiff's complaint did not allege that she was ready, able and willing to pay \$24,500 in April, 1932. After the court decided the case plaintiff was allowed to file an amendment, in which she alleged that she was able to pay the sum of \$250 due in March, and also the sum of \$24,500 due on April 14, 1932, "and that the non-performance of the contract on her part in not paying the sum of \$250 and interest due in March, 1932, and the additional sum of \$24,500 and interest due on April 14, 1932, was due to the fact that she was prevented by the defendant, Herbert J. Buchsbaum, from making the said payments in accordance with the

very glad. Do you remember making this answer? Yes, it is clear that Hofferer desired to avoid foreclosure proceedings and to allow plaintiff and defendant time in which to meet their obligations, but it is equally clear that neither defendant nor plaintiff, at the time, desired to save their property if saving it required meeting their obligations. The owner of the blanket mortgage could not get her money back, nor any considerable part of it, by foreclosure proceedings. Plaintiff further testified that on several occasions, particularly in December, 1931, she was notified by Mr. Hofferer that defendant was not making payments of principal and interest on the blanket mortgage; that every time she received such notice she called defendant and he told her not to worry, to just take her payments on her contract with him and that she was fully protected by her bond. Defendant denied making these statements. Plaintiff did not see fit to call attorney Masse as a witness.

Judge Prystalski, who tried the case, gave a great deal of time to the hearing and consideration of the evidence. In his opinion deciding the case he called attention to the fact that the depth of the great depression was in 1931 and that \$24,500, in April, 1932, "was an awful lot of money." He also called attention to the fact that plaintiff's complaint did not allege that she was ready, able and willing to pay \$24,500 in April, 1932. After the court decided the case plaintiff was allowed to file an amendment, in which she alleged that she was able to pay the sum of \$250 due in March, and also the sum of \$24,500 due on April 14, 1932, "and that the non-performance of the contract on her part in not paying the sum of \$250 and interest due in March, 1932, and the additional sum of \$24,500 and interest due on April 14, 1932, was due to the fact that she was prevented by the defendant, Herbert J. Buchsbaum, from making the said payments in accordance with the

terms of the contract." The court held that under the evidence he was compelled to find that plaintiff never offered to pay the \$24,500, and that the evidence failed to show that she was ready, able and willing to pay it. The court expressed sorrow that he was obliged, under the evidence, to decide the case against plaintiff.

In a late case, Hall v. Pittenger, 365 Ill. 135, the Supreme court said (pp. 135, 136): "The chancellor who tried the case received the evidence in open court, saw the witnesses and heard them testify. Under these circumstances we will not disturb the findings of the chancellor unless manifestly and palpably wrong; and this is true even though we might be inclined to find otherwise had we been placed in his stead upon the trial of the suit. (Schrader v. Schrader, 298 Ill. 469; Brown v. Stewart, 159 id. 212.) We will therefore limit our review to determining whether or not the chancellor was manifestly or palpably wrong or his conclusion manifestly erroneous." Many cases to the same effect might be cited. After a careful examination of the record we are satisfied that Judge Prystalski's finding that the evidence failed to show that plaintiff was ready and able to make the \$24,500 payment was fully warranted by the evidence. Both plaintiff and defendant were victims of the great depression. Plaintiff's testimony shows how the rents from her apartment building went down; that people were losing their jobs and there were many vacancies in her building, and she was compelled to use her salary of \$175 a month to make up the monthly payments. We take judicial notice of the fact that at the time in question it was practically impossible to raise money to save real property from foreclosure, regardless of its past value, and the courts of this county were overburdened with foreclosure suits. In April, 1932, it would have been folly for plaintiff to meet the payments then due under the contract.

terms of the contract." The court held that under the evidence it was compelled to find that plaintiff never offered to pay the \$24,500, and that the evidence failed to show that she was ready, able and willing to pay it. The court expressed a view that it was obliged, under the evidence, to decide the case against plaintiff.

In a late case, Hill v. Pittenger, 305 Ill. 132, the supreme court said (pp. 135, 136): "The chancellor who tried the case received the evidence in open court, saw the witnesses and heard them testify. Under these circumstances we will not disturb the findings of the chancellor unless manifestly and palpably wrong; and this is true even though we might be inclined to find otherwise had we been placed in his stead upon the trial of the suit. (Johnson v. Schaefer, 298 Ill. 463; Brown v. Brown, 177 Ill. 212.) We will

therefore limit our review to determining whether or not the chancellor was manifestly or palpably wrong on his conclusion manifestly erroneous." Many cases to the same effect might be cited.

After a careful examination of the record we are satisfied that Judge Rydzinski's finding that the evidence failed to show that plaintiff was ready and able to make the \$24,500 payment was fully warranted by the evidence. Plaintiff's testimony shows that she was of the great depression. Plaintiff's condition shows that she was from her apartment building went down; that she was unable to find a job and there were many vacancies in the building, and she was

compelled to use her salary of \$175 a month to make up the monthly payments. We take judicial notice of the fact that at the time in question it was practically impossible to raise money to save real property from foreclosure, regardless of its past value, and the courts of this county were overwhelmed with foreclosure suits. In April, 1932, it would have been folly for plaintiff to meet the payments then due under the contract.

Counsel for plaintiff contend that the evidence shows that defendant repudiated the contract in March, 1932, and that plaintiff was therefore under no obligation to pay or tender the payments due in March, 1932, and April, 1932. If we assume the correctness of this contention, in toto, nevertheless, in order to recover plaintiff would be obliged to show that she was ready, able and willing to meet the said payments at the times in question. Counsel for plaintiff practically concedes that plaintiff would be so obligated, but insists that the trial court would have been justified in finding that there was sufficient evidence to show "the ability of the plaintiff to pay." As we have heretofore stated, we are in accord with the finding of the trial court in respect to this question of fact. Indeed, after the owner of the blanket mortgage had given plaintiff an opportunity to save the property and she had agreed to a receivership, the arrangement fell through and plaintiff sued Hefferan. If plaintiff were ready, able and willing to meet the March and April payments, why did she consent, in April, 1932, to let the property go into temporary receivership?

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

Counsel for Plaintiff contends that the evidence shows that defendant repudiated the contract in March, 1932, and that Plaintiff was therefore under no obligation to pay or tender the payments due in March, 1932, and April, 1932. It is assumed the correctness of this contention, in which, nevertheless, in order to recover Plaintiff would be obliged to show that she was ready, able and willing to meet the said payments at the times in question. Counsel for Plaintiff practically concedes that Plaintiff would be so obligated, but insists that the total court would have been justified in finding that there was substantial evidence to show "the ability of the Plaintiff to pay." It is here contended that, we are in accord with the finding of the trial court in respect to this question of fact. Indeed, after the order of the blanket mortgage had given Plaintiff an opportunity to have the property and she had agreed to a receivership, the arrangement fell through and Plaintiff sued defendant. If Plaintiff were ready, able and willing to meet the March and April payments, why did she consent, in April, 1932, to let the property go into temporary receivership?

The judgment of the Circuit court of Cook County is affirmed.

RECEIVED AT CHICAGO.

Sullivan, P. J., and Friend, J., concur.

41874

316 I.A. 449

STELLA FELLHEIMER,
(Plaintiff) Appellee,

v.

HAROLD B. WEISS et al.,
(Defendants).

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MARTIN L. STRAUS, BARTON H.
SACKETT, WILLIAM H. YATES
and ADOLPH DREY,
(Defendants) Appellants.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Stella Fellheimer, plaintiff, the assignee of a judgment creditor of a corporation, sued all of the directors of the corporation to hold them liable to the judgment creditor for the amount of the judgment. Four of the directors, Martin L. Straus, Barton H. Sackett, William H. Yates and Adolph Drey (hereinafter called defendants), were served with summonses. An amended complaint was filed on October 23, 1935, to which defendants filed an answer. On October 7, 1940, plaintiff filed a motion, supported by affidavits, for summary judgment. Defendants filed counter-affidavits to the motion and on April 18, 1941, the trial court entered a summary judgment for \$29,645.45 on the affidavits and counter-affidavits. Defendants appeal from this judgment.

The amended complaint contained three counts, but plaintiff states in her brief that she relies upon count II, alone, in support of the summary judgment. Count II realleges paragraphs (1) to (19), inclusive, of count I. These paragraphs allege:

"(1) That on May 15, 1931 Harry Fellheimer filed suit for breach of contract in the United States District Court in Omaha, Nebraska against the Hartman Furniture and Carpet Company, a Nebraska Corporation, which after trial resulted in a judgment

STELLA FELLHIMER
(Plaintiff) Appellee,

v.

HAROLD B. WEISS et al.,
(Defendants)

MARTIN L. STRAUS, BERTON H.
SACKETT, WILLIAM H. YATES
and ADOLPH DREY,
(Defendants)

APPEAR FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Stella Fellhimer, plaintiff, the assignee of a judgment creditor of a corporation, sued all of the directors of the corporation to hold them liable to the judgment creditor for the amount of the judgment. Four of the directors, Martin L. Straus, Berton H. Sackett, William H. Yates and Adolph Drey (hereinafter called defendants), were served with summonses. An amended complaint was filed on October 23, 1935, to which defendants filed an answer. On October 7, 1940, plaintiff filed a motion, supported by affidavits, for summary judgment. Defendants filed counter-affidavits to the motion and on April 18, 1941, the trial court entered a summary judgment for \$29,645.45 on the affidavits and counter-affidavits. Defendants appeal from this judgment.

The amended complaint contained three counts, but plaintiff states in her brief that she relies upon count II, alone, in support of the summary judgment. Count II recites paragraphs (1) to (19), inclusive, of count I. These paragraphs allege:

"(1) That on May 15, 1931 Harry Fellhimer filed suit

for breach of contract in the United States District Court in Omaha, Nebraska against the Hartman Furniture and Carpet Company, a Nebraska Corporation, which after trial resulted in a judgment

in his favor on January 7, 1932 in the sum of \$18,015 and costs amounting to \$66.75 with interest thereon at 7% per annum from January 7, 1932.

"(2) That on April 6, 1932 an execution was issued and delivered to the United States Marshal at Omaha and returned unsatisfied on April 7, 1932.

"(3) That on April 7, 1932 Harry Fellheimer assigned all his interest in said judgment to his wife Stella Fellheimer the plaintiff. That said assignment was duly filed with the Clerk of the United States District Court at Omaha, Nebraska and

"(4) Due notice thereof given to Hartman Furniture and Carpet Company, a Nebraska Corporation, and

"(5) That plaintiff is the present holder of said assignment and judgment.

"(6) That defendants Harold B. Wess, Barton H. Sackett, Adolph Drey, William H. Yates, Martin L. Straus, Meyer Kuit, Edward G. Felsenthal and Joseph M. Strauch were at all times set forth in the complaint officers and directors of the Hartman Furniture and Carpet Company, a Nebraska Corporation.

"(7) That in May, 1931 the defendant officers and directors of the Hartman Furniture and Carpet Company, a Nebraska Corporation, fraudulently connived together and entered into and engaged in a course of conduct designed and contemplated to dispose of the assets of the Hartman Furniture and Carpet Company, a Nebraska Corporation, and to remove said assets from Nebraska and put said assets beyond the reach of creditors of said corporation, and that these directors caused said Company to become insolvent in that the action of said directors and officers resulted in the inability of said Nebraska Corporation to pay its debts as they matured, and in that after the actions of the officers and directors the assets of said Hartman Furniture

in his favor on January 7, 1932 in the sum of \$18,015 and costs amounting to \$66.75 with interest thereon at 7% per annum from January 7, 1932.

"(2) That on April 6, 1932 an execution was issued and

delivered to the United States Marshal at Omaha and returned

unsatisfied on April 7, 1932.

"(3) That on April 7, 1932 Harry Fellheimer assigned all

his interest in said judgment to his wife Stella Fellheimer the

plaintiff. That said assignment was duly filed with the Clerk

of the United States District Court at Omaha, Nebraska and

"(4) Due notice thereof given to Hartman Furniture and

Carpet Company, a Nebraska Corporation, and

"(5) That plaintiff is the present holder of said assign-

ment and judgment.

"(6) That defendants Harold B. Weas, Barton H. Beckett,

Adolph Drey, William H. Yates, Martin L. Struss, Meyer Kniff,

Edward G. Felsenthal and Joseph E. Struss were at all times

set forth in the complaint officers and directors of the Hartman

Furniture and Carpet Company, a Nebraska Corporation.

"(7) That in May, 1931 the defendant officers and direc-

tors of the Hartman Furniture and Carpet Company, a Nebraska Cor-

poration, fraudulently connived together and entered into and

engaged in a course of conduct designed and contemplated to

dispose of the assets of the Hartman Furniture and Carpet Company,

a Nebraska Corporation, and to remove said assets from Nebraska

and put said assets beyond the reach of creditors of said corpor-

ation, and that these directors caused said Company to become

insolvent in that the action of said directors and officers

resulted in the inability of said Nebraska Corporation to pay

its debts as they matured, and in that after the action of the

officers and directors the assets of said Hartman Furniture

and Carpet Company, a Nebraska Corporation, at a fair valuation, were less than the liabilities of said Corporation, all contrary to the laws of Nebraska and in fraud of the creditors of said Corporation.

"(8) That on or about June 30, 1931, Joseph M. Strauch as Vice President and Meyer Kuit as Assistant Secretary of the Hartman Furniture and Carpet Company, a Nebraska Corporation, without prior authority or any authority from the board of directors or stockholders of said Corporation, entered into an agreement with the Hartman Furniture and Carpet Company an Illinois Corporation, whereby the Nebraska Corporation transferred or agreed to transfer its accounts and contracts receivable to the Hartman Furniture and Carpet Company, an Illinois Corporation, which said receivables were in turn to be pledged by Hartman Furniture and Carpet Company, an Illinois Corporation, as security for a debt of said Corporation, and that the sale of said receivables of Hartman Company, a Nebraska Corporation, to Hartman Company, an Illinois Corporation, was made without consideration; that thereafter the action of said officers and directors was confirmed and approved by a special board of directors' meeting of the Hartman Furniture and Carpet Company, a Nebraska Corporation, held at Chicago, Illinois, on August 27, 1931, at which meeting were present the following directors: Martin L. Straus, Edward G. Felsenthal, Adolph Drey, Charles A. Frank and Joseph M. Strauch, all of whom waived formal notice of the meeting and ratified and approved the execution of said agreement and authorized the officers of said Hartman Furniture and Carpet Company, a Nebraska Corporation, to take all such further action as might be necessary in their opinion to carry out the agreement so entered into, and to make any changes which might be deemed advisable.

"(9) That pursuant to said agreement all of the existing receivables of the Hartman Furniture and Carpet Company, a Nebraska Corporation, were assigned to the Hartman Furniture and Carpet

and Carpet Company, a Nebraska Corporation, at a fair valuation, were less than the liabilities of said Corporation, all contrary to the laws of Nebraska and in fraud of the creditors of said Corporation.

"(8) That on or about June 30, 1931, Joseph M. Struch as Vice President and Meyer Kutz as Assistant Secretary of the Hartman Furniture and Carpet Company, a Nebraska Corporation, without prior authority or any authority from the board of directors or stockholders of said Corporation, entered into an agreement with the Hartman Furniture and Carpet Company an Illinois Corporation, whereby the Nebraska Corporation transferred or agreed to transfer its accounts and contracts receivable to the Hartman Furniture and Carpet Company, an Illinois Corporation, which said receivables were in turn to be pledged by Hartman Furniture and Carpet Company, an Illinois Corporation, as security for a debt of said Corporation, and that the sale of said receivables of Hartman Furniture and Carpet Company, an Illinois Corporation, was made without consideration; that thereafter the action of said officers and directors was confirmed and approved by a special board of directors' meeting of the Hartman Furniture and Carpet Company, a Nebraska Corporation, held at Chicago, Illinois, on August 27, 1931, at which meeting were present the following directors: Martin L. Struch, Edward G. Palsenthal, Adolph Drey, Charles A. Frank and Joseph M. Struch, all of whom waived formal notice of the meeting and ratified and approved the execution of said agreement and authorized the officers of said Hartman Furniture and Carpet Company, a Nebraska Corporation, to take all such further action as might be necessary in their opinion to carry out the agreement so entered into, and to make any changes which might be deemed advisable.

"(9) That pursuant to said agreement all of the existing receivables of the Hartman Furniture and Carpet Company, a Nebraska Corporation, were assigned to the Hartman Furniture and Carpet

Company, an Illinois Corporation, and from said time up to the cessation of business by said Hartman Furniture and Carpet Company, a Nebraska Corporation, on December 31, 1931, the receivables of said Nebraska Corporation were likewise from time to time assigned to said Hartman Furniture and Carpet Company, an Illinois Corporation, all without consideration to said Hartman Furniture and Carpet Company, a Nebraska Corporation, and in fraud of the creditors of said Corporation.

"(10) That at a special meeting of the board of directors of Hartman Furniture and Carpet Company, a Nebraska Corporation, held at Chicago, Illinois, on September 19, 1931, the resignation of Edward G. Felsenthal as Vice President, Treasurer and Director was accepted and William H. Yates was elected as director for the unexpired term of Mr. Felsenthal. That on said date Barton H. Sackett who also had been a director on said August 27, 1931, and was at all times thereafter mentioned a director of said Nebraska Corporation, was elected as Second Vice-President of said Hartman Furniture and Carpet Company, a Nebraska Corporation.

"(11) That on November 9, 1931 and subsequent thereto until the dissolution of said Corporation, the officers of said Hartman Furniture and Carpet Company, a Nebraska Corporation, were Martin L. Straus, President, Harold B. Wess, First Vice-President, Barton H. Sackett, Second Vice-President, Secretary, and Meyer Kuit, Assistant Secretary; that the board of directors were the same persons excepting Meyer Kuit, and in addition thereto, Adolph Drey, Charles A. Frank and William H. Yates; that said persons were acting as said officers and directors and participating in the disposition of the assets of said corporation, and of the declaration and paying of a certain dividend as hereinafter set forth, and of winding up the business of said Corporation, all to plaintiff's damage.

"(12) That on November 9, 1931 a special meeting of the

Company, an Illinois Corporation, and from said time up to the cessation of business by said Hartman Furniture and Carpet Company, a Nebraska Corporation, on December 31, 1931, the receivables of said Nebraska Corporation were likewise from time to time assigned to said Hartman Furniture and Carpet Company, an Illinois Corporation, all without consideration to said Hartman Furniture and Carpet Company, a Nebraska Corporation, and in favor of the creditors of said Corporation.

"(10) That at a special meeting of the board of directors of Hartman Furniture and Carpet Company, a Nebraska Corporation, held at Chicago, Illinois, on September 19, 1931, the resignation of Edward G. Weisenthal as Vice President, Treasurer and Director was accepted and William H. Yates was elected as director for the unexpired term of Mr. Weisenthal. That on said date Barton H. Sackett who also had been a director on said August 27, 1931, and was at all times thereafter mentioned a director of said Nebraska Corporation, was elected as Second Vice-President of said Hartman Furniture and Carpet Company, a Nebraska Corporation.

"(11) That on November 9, 1931 and subsequent thereto until the dissolution of said Corporation, the officers of said Hartman Furniture and Carpet Company, a Nebraska Corporation, were Martin L. Straus, President, Harold B. Weiss, First Vice-President, Barton H. Sackett, Second Vice-President, Secretary and Meyer Kluft, Assistant Secretary; that the board of directors were the same persons excepting Meyer Kluft, and in addition thereto, Adolph Drey, Charles A. Frank and William H. Yates; that said persons were acting as said officers and directors and participating in the disposition of the assets of said corporation, and of the declaration and paying of a certain dividend as hereinafter set forth, and of winding up the business of said Corporation, all to plaintiff's damage.

board of directors of said Hartman Furniture and Carpet Company, a Nebraska Corporation, was held in Chicago, at which were present: Harold B. Wess, Barton H. Sackett, Adolph Drey, Charles A. Frank and William H. Yates.

"(13) That at said meeting it was reported to said directors that pursuant to the action of the meeting of the board of directors held August 27, 1931, said corporation had sold to the Hartman Furniture & Carpet Company, an Illinois Corporation, all accounts receivable at that time owned by said corporation, and all accounts receivable thereafter to be acquired by said corporation, and that pursuant to said action there was then due and owing to said Hartman Furniture & Carpet Company, a Nebraska Corporation, from said Hartman Furniture & Carpet Company, an Illinois Corporation, the sum of \$384,736.01; it was further reported to the directors at said meeting that said corporation had a surplus upon its books of \$540,434.85 and that included among its assets was the above mentioned obligation of the Hartman Furniture and Carpet Company, an Illinois corporation, and that in addition thereto there was owing from said Hartman Furniture & Carpet Company, an Illinois corporation, the additional sum of \$103,011.05 for moneys advanced; that the said directors thereupon passed a resolution distributing to its stockholders the sum of \$487,747.06 as a property dividend to be paid out of the accumulated surplus of said corporation by an assignment and transfer of the debt due said corporation from the Hartman Furniture & Carpet Company, an Illinois corporation, said dividend being the aggregate of the debts owed by said Hartman Furniture & Carpet Company, an Illinois corporation, to said Hartman Furniture & Carpet Company, a Nebraska corporation.

"(14) That the Hartman Corporation of Virginia, with the exception of qualifying stock held by the directors, was the sole stockholder of said Hartman Furniture & Carpet Company, a Nebraska Corporation, and of Hartman Furniture & Carpet Company, an Illinois

board of directors of said Hartman Furniture and Carpet Company, a Nebraska Corporation, was held in Chicago, at which were present: Harold B. Weas, Barton H. Sackett, Adolph Drey, Charles A. Frank and William H. Yates.

"(13) That at said meeting it was reported to said directors that pursuant to the action of the meeting of the board of directors held August 27, 1931, said corporation had sold to the Hartman Furniture & Carpet Company, an Illinois Corporation, all accounts receivable at that time owned by said corporation, and all accounts receivable thereafter to be acquired by said corporation, and that pursuant to said action there was then due and owing to said Hartman Furniture & Carpet Company, a Nebraska Corporation, from said Hartman Furniture & Carpet Company, an Illinois Corporation, the sum of \$384,736.01; it was further reported to the directors at said meeting that said corporation had a surplus upon its books of \$740,434.87 and that included among its assets was the above mentioned obligation of the Hartman Furniture and Carpet Company, an Illinois corporation, and that in addition thereto there was owing from said Hartman Furniture & Carpet Company, an Illinois Corporation, the additional sum of \$103,011.07 for moneys advanced; that the said directors thereupon passed a resolution distributing to its stockholders the sum of \$487,747.06 as a property dividend to be paid out of the accumulated surplus of said corporation by an assignment and transfer of the debt due said corporation from the Hartman Furniture & Carpet Company, an Illinois corporation, said dividend being the aggregate of the debts owed by said Hartman Furniture & Carpet Company, an Illinois corporation, to said Hartman Furniture & Carpet Company, a Nebraska Corporation.

"(14) That the Hartman Corporation of Virginia, with the exception of qualifying stock held by the directors, was the sole stockholder of said Hartman Furniture & Carpet Company, a Nebraska Corporation, and of Hartman Furniture & Carpet Company, an Illinois Corporation.

Corporation, and that the declaration of the said dividend transferred from the Hartman Corporation of Nebraska to the Hartman Corporation of Virginia, the said obligation of the Hartman Corporation of Illinois, and was a fraud on creditors of the Hartman Corporation of Nebraska.

"(15) That the action of the board of directors at the meeting of November 9, 1931, was subsequently ratified by Martin L. Straus, President and a director of the said Hartman Furniture & Carpet Company, a Nebraska Corporation.

"(16) That after the declaration of said dividend, the remaining assets of the Hartman Company of Nebraska were by the defendants diverted in some manner, not known to plaintiff, from the corporation so that when the Hartman Company of Nebraska ceased business on December 31, 1931, it did not have sufficient assets to pay its creditors.

"(17) Alleges on information and belief that the actions of said officers and directors in selling the accounts receivable of the Hartman Company of Nebraska and declaring said dividend, was for the purpose of removing assets of said Hartman Company of Nebraska beyond the reach of creditors and was a fraud on the creditors of said corporation, and contrary to the laws of Nebraska, and was a breach of the duty owed by the officers and directors of said corporation to creditors thereof, and that plaintiff was damaged by reason thereof, in that there were no assets of said corporation which could be applied on plaintiff's judgment, but said judgment was made worthless and uncollectible.

"(18) That at all times mentioned said officers and directors of Hartman Furniture & Carpet Company, a Nebraska Corporation, were also directors and officers of Hartman Furniture & Carpet Company, an Illinois Corporation, and in part, of Hartman Corporation, a Virginia Corporation, to whom and for whose benefit they transferred the said assets of the Hartman Company of Nebraska

Corporation, and that the declaration of the said dividend transferred from the Hartman Corporation of Nebraska to the Hartman Corporation of Virginia, the said obligation of the Hartman Corporation of Illinois, and was a fraud on creditors of the Hartman Corporation of Nebraska.

"(15) That the action of the board of directors at the meeting of November 9, 1931, was subsequently ratified by Martin L. Evans, President and a director of the said Hartman Furniture & Carpet Company, a Nebraska Corporation.

"(16) That after the declaration of said dividend, the remaining assets of the Hartman Company of Nebraska were by the defendants diverted in some manner, not known to plaintiff, from the corporation so that when the Hartman Company of Nebraska ceased business on December 31, 1931, it did not have sufficient assets to pay its creditors.

"(17) Alleges on information and belief that the actions of said officers and directors in selling the accounts receivable of the Hartman Company of Nebraska and declaring said dividend, was for the purpose of removing assets of said Hartman Company of Nebraska beyond the reach of creditors and was a fraud on the creditors of said corporation, and contrary to the laws of Nebraska, and was a breach of the duty owed by the officers and directors of said corporation to creditors thereof, and that plaintiff was damaged by reason thereof, in that there were no assets of said corporation which could be applied on plaintiff's judgment, but said judgment was made worthless and uncollectible.

"(18) That at all times mentioned said officers and directors of Hartman Furniture & Carpet Company, a Nebraska Corporation, were also directors and officers of Hartman Furniture & Carpet Company, an Illinois Corporation, and in part, of Hartman Corporation, a Virginia Corporation, to whom and for whose benefit they transferred the said assets of the Hartman Company of Nebraska

without consideration.

"(19) That the said officers and directors of said Hartman Furniture & Carpet Company, a Nebraska Corporation, knew of the claim of plaintiff's assignor against said corporation at the time of the transfer of the property mentioned above and at the time of the declaration of the dividend to the stockholders of said corporation, and wrongfully and unlawfully made no provision for payment of said claim."

Count II further alleges:

"(2) That beginning about December 1, 1931, the Hartman Company of Nebraska conducted a sale of all its remaining assets, which sale lasted until December 31, 1931, on which day the Corporation closed its store and ceased doing business in Nebraska, and removed any remaining assets from said State and from then up to now, said corporation has conducted no business and maintained no business [office] in Nebraska, nor has it had any officers, directors or agents or assets in said State.

"(3) That the cessation of business, sale or other disposal of all assets, and the removal of all officers and directors from the State of Nebraska on said 31st day of December, 1931, constituted a dissolution of said corporation.

"(4) That pursuant to Section 24-107 of the compiled Statutes of the State of Nebraska for 1929, on the dissolution of said corporation, the defendant directors of said corporation became trustees for the benefit of creditors, and became personally, jointly and severally, liable to the creditors of said corporation; that said defendant directors are therefore personally, jointly and severally, liable to the plaintiff in the sum of \$18,081.75, together with interest thereon at the rate of 7% per annum from and after the 7th day of January, 1932."

Briefly stated, defendants, in their answer, deny that they conspired to or in any way disposed of the assets of the Hartman

without consideration.

"(1) That the said officers and directors of said Hartman

Furniture & Carpet Company, a Nebraska Corporation, knew of the claim of plaintiff's assignor against said corporation at the time of the transfer of the property mentioned above and at the time of the declaration of the dividend to the stockholders of said corporation, and wrongfully and unlawfully made no provision for payment of said claim."

Count II further alleges:

"(2) That beginning about December 1, 1931, the Hartman Company of Nebraska conducted a sale of all its remaining assets, which sale lasted until December 31, 1931, on which day the Corporation closed its store and ceased doing business in Nebraska, and removed any remaining assets from said State and from then up to now, said corporation has conducted no business and maintained no business [office] in Nebraska, nor has it had any officers, directors or agents or assets in said State.

"(3) That the cessation of business, sale or other disposal of all assets, and the removal of all officers and directors from the State of Nebraska on said 31st day of December, 1931, constituted a dissolution of said corporation.

"(4) That pursuant to Section 24-107 of the compiled Statutes of the State of Nebraska for 1929, on the dissolution of said corporation, the defendant directors of said corporation became trustees for the benefit of creditors, and became personally, jointly and severally, liable to the creditors of said corporation; that said defendant directors are therefore personally, jointly and severally, liable to the plaintiff in the sum of \$18,081.75, together with interest thereon at the rate of 7% per annum from and after the 7th day of January, 1932."

Briefly stated, defendants, in their answer, deny that they conspired to or in any way disposed of the assets of the Hartman

Company of Nebraska so as to make it unable to pay its creditors; deny that the property dividend of November 9, 1931, was improper or left or rendered the corporation insolvent; deny that they dissolved or caused the corporation to be dissolved; deny that any of their acts constituted a dissolution of the corporation; deny that they or any of them diverted the assets remaining after the property dividend on November 9, 1931, so that the corporation did not have sufficient assets to pay creditors when it ceased business on December 31, 1931; deny that the Nebraska corporation removed any assets from the State; deny that they committed any fraud on the plaintiff or any creditor or that they were liable to plaintiff under any statute of Nebraska or otherwise.

Plaintiff, in support of her motion for summary judgment, filed ten affidavits, which establish the following facts, all of which are admitted by defendants: That Harry Fellheimer obtained a judgment for \$18,015 against the Nebraska corporation on a contested pension claim at a time when he was over seventy years of age; that this claim was assigned to Stella Fellheimer, plaintiff; that on April 6, 1932, a writ of execution against the Nebraska corporation was returned unsatisfied by the marshal of the United States District Court, Omaha, Nebraska; that it appears from a certificate of the Secretary of State of Nebraska that the Nebraska corporation was dissolved on March 23, 1934, for "nonpayment of occupation taxes," and "that no notice of dissolution by action of stockholders of Hartman Furniture & Carpet Company was received and filed in the office of the Secretary of State;" that on October 31, 1931, the corporation, according to its balance sheet of that date, copies of which were attached to the affidavits of Joseph Kane and Anna Reardon, had a surplus of \$540,434.85; that the following took place: The assignment of June 30, 1931, and the board meeting of August 27, 1931, as well as the assignment of the receivables of the Hartman Company of Nebraska and the

Company of Nebraska so as to make it unable to pay its creditors; deny that the property dividend of November 9, 1931, was improper or left or rendered the corporation insolvent; deny that they dissolved or caused the corporation to be dissolved; deny that any of their acts constituted a dissolution of the corporation; deny that they or any of them diverted the assets remaining after the property dividend on November 9, 1931, so that the corporation did not have sufficient assets to pay creditors when it ceased business on December 31, 1931; deny that the Nebraska corporation removed any assets from the state; deny that they committed any fraud on the plaintiff or any creditor or that they were liable to plaintiff under any statute of Nebraska or otherwise.

Plaintiff, in support of her motion for summary judgment, filed ten affidavits, which establish the following facts, all of which are admitted by defendants: That Harry Fehlmeyer obtained a judgment for \$18,017 against the Nebraska corporation on a contested pension claim at a time when he was over seventy years of age; that this claim was assigned to Stella Fehlmeyer, plaintiff; that on April 6, 1932, a writ of execution against the Nebraska corporation was returned unsatisfied by the marshal of the United States District Court, Omaha, Nebraska; that it appears from a certificate of the Secretary of State of Nebraska that the Nebraska corporation was dissolved on March 23, 1934, for "nonpayment of occupation taxes," and "that no notice of dissolution by action of stockholders of Hartman Furniture & Carpet Company was received and filed in the office of the Secretary of State;" that on October 31, 1931, the corporation, according to its balance sheet of that date, copies of which were attached to the affidavits of Joseph Kane and Anna Resdon, had a surplus of \$40,454.85; that the following took place: The assignment of June 30, 1931, and the board meeting of August 25, 1931, as well as the assignment of the receivables of the Hartman Company of Nebraska and the

dividend meeting of November 9, 1931, with subsequent ratification of the action of that meeting by Martin L. Straus.

The affidavit of Joseph M. Kane, an employee of Haskins & Sells, accountants and auditors, offered by plaintiff, states that from his examination of the minute books and records of the Nebraska corporation it appeared that by reason of losses in operation from December 31, 1930, to October 31, 1931, the surplus of the company was reduced from \$621,742.21 to \$540,434.85; that by December 31, 1931, this had been eliminated and a deficit of \$87,943.95 appeared, not including the instant judgment and a possible rent claim; that the principal reasons for the elimination of surplus were the property dividend of \$487,747.06, the loss of \$18,188.63 on the sale of equipment, and \$17,576.68 for writing off the unamortized portion of leasehold improvements, and, in addition, an operating loss of the Nebraska corporation for November and December, 1931, of \$120,122.47.

The affidavit of Anna Reardon, former bookkeeper of Hartman's of Nebraska, offered by plaintiff, states that in addition to the fact that the receivables and the proceeds thereof had been assigned to the C.I.T., beginning November 6, 1931, all merchandise of the Nebraska corporation was sold at a liquidation sale at ten, twenty, thirty and forty^{cents}/on the dollar, which sale was completed by December 31, 1931, and at that time the Nebraska corporation had no assets in the State.

The affidavit of Fred W. Meis, former credit and collection manager, introduced by plaintiff, states that the receivables were assigned to the C. I. T. Corporation and the amount of the same added to the debt due the Nebraska corporation from the Illinois corporation in lieu of the accounts themselves; that the Nebraska corporation commenced a liquidation sale on November 7, 1931, and its merchandise was sold at ten, twenty, thirty and forty cents on the dollar and later advertised and sold at half wholesale

dividend meeting of November 9, 1931, with subsequent ratification of the action of that meeting by Martin L. O'Connell.

The affidavit of Joseph M. Kane, an employee of Haskins & Sells, accountants and auditors, offered by plaintiff, states that from his examination of the minute books and records of the Nebraska corporation it appeared that by reason of losses in operation from December 31, 1930, to October 31, 1931, the surplus of the company was reduced from \$21,742.21 to \$240.43; that by December 31, 1931, this had been eliminated and a deficit of \$27,943.97 appeared, not including the instant judgment and a possible rent claim; that the principal reasons for the elimination of surplus were the property dividend of \$437,747.00, the loss of \$18,188.63 on the sale of equipment, and \$17,756.68 for writing off the unamortized portion of leasehold improvements, and, in addition, an operating loss of the Nebraska corporation for November and December, 1931, of \$150,122.47.

The affidavit of Anna Reagon, former bookkeeper of Hartman, of Nebraska, offered by plaintiff, states that in addition to the fact that the receivables and the proceeds thereof had been assigned to the C.I.T., beginning November 6, 1931, all merchandise of the Nebraska corporation was sold at a liquidation sale at ten, twenty, thirty and forty ^{cents} on the dollar, which sale was completed by December 31, 1931, and at that time the Nebraska corporation had no assets in the state.

The affidavit of Fred W. Metz, former credit and collection manager, introduced by plaintiff, states that the receivables were assigned to the C.I.T. Corporation and the amount of the same added to the debt due the Nebraska corporation from the Illinois corporation in lieu of the accounts themselves; that the Nebraska corporation commenced a liquidation sale on November 7, 1931, and its merchandise was sold at ten, twenty, thirty and forty cents on the dollar and later advertised and sold at half wholesale

price, and that for the last three days of 1931 it sold its merchandise at a small part of cost; that after the close of 1931 the Nebraska corporation did no business whatever; that after December 20, 1931, L & L Company was organized by affiant, Caton and two members of the Nebraska corporation's firm of attorneys; that L & L corporation purchased the office furniture of the Nebraska corporation about the close of 1931 for \$1,100 and collected the accounts receivable of the Nebraska corporation which had been assigned to C. I. T. Corporation.

The affidavit of Harley A. Caton, offered by plaintiff, states he was a salesman for the Nebraska corporation and had charge of bad accounts and was one of the incorporators of L & L Company; that L & L Company received the accounts receivable ledgers of the Nebraska corporation when it closed its store December 31, 1931, at which time the receivables amounted to over \$200,000; that between January 1, 1932, and July 28, 1933, affiant and the L & L Company collected over \$150,000 and remitted same to C. I. T.; that between July 28, 1933, and February 26, 1934, he collected \$12,000 on receivables and remitted same to Barton H. Sackett, trustee, who was also treasurer of Hartman's Inc.; that between February 26, 1934, and March 3, 1936, he collected \$6,000 on receivables and remitted to Hartman's, Inc., which later changed its name to the Advance Corporation.

The affidavit of John Potter Webster, one of the owners of the premises occupied by Hartman's of Nebraska, offered by plaintiff, states that Hartman's had a lease demising the premises for \$4,000 a month from 1931 to the end of the term on February 29, 1936, and that the owners had agreed to defer \$1,000 a month for a year beginning April, 1931, up to which time all rent reserved in the lease had been paid.

The affidavit of Clifford W. Calkins, offered by plaintiff, states that he was a real estate expert and had made a detailed

price, and that for the last three days of 1931 it sold its merchandise at a small part of cost; that after the close of 1931 the Nebraska corporation did no business whatever; that after December 30, 1931, L & I Company was organized by affiant, Gatton and two members of the Nebraska corporation's firm of attorneys; that L & I corporation purchased the office furniture of the Nebraska corporation about the close of 1931 for \$1,100 and collected the accounts receivable of the Nebraska corporation which had been assigned to C. I. T. Corporation.

The affidavit of Harry A. Gatton, offered by plaintiff, states he was a salesman for the Nebraska corporation and had charge of bad accounts and was one of the incorporators of L & I Company; that L & I Company received the accounts receivable ledgers of the Nebraska corporation when it closed its store December 31, 1931, at which time the receivables amounted to over \$200,000; that between January 1, 1932, and July 28, 1933, affiant and the L & I Company collected over \$150,000 and remitted same to C. I. T.; that between July 28, 1933, and February 26, 1934, he collected \$12,000 on receivables and remitted same to Barton H. Sackett, trustee, who was also treasurer of Hartman's Inc.; that between February 26, 1934, and March 2, 1936, he collected \$6,000 on receivables and remitted to Hartman's, Inc., which later changed its name to the Advance Corporation.

The affidavit of John Potter Webster, one of the owners of the premises occupied by Hartman's of Nebraska, offered by plaintiff, states that Hartman's had a lease expiring the premises for \$4,000 a month from 1931 to the end of the year on January 29, 1936, and that the owners had agreed to defer \$1,000 a month for a year beginning July 1, 1931, up to which time all rent reserved in the lease had been paid.

The affidavit of Clifford W. Perkins, offered by plaintiff, states that he was a real estate expert and had made a detailed

study of the premises and was of the opinion that they were not worth over \$34,000 a year for the period 1932 to February 29, 1936, that their fair rental value would have been about \$26,712 per year, and that Hartman's would have lost on the lease \$58,333.34 during that period.

Each of the defendants filed a separate affidavit. Their affidavits tend to show that the Nebraska corporation was solvent both before and after the property dividend of November 9, 1931; that the dividend was declared by them only after they had consulted the balance sheet of the company as of October 31, 1931 (a copy of which was attached to the affidavit of defendant Straus), and upon the advice of legal counsel from three States; that the dividend was perfectly proper, legal and advisable; that the balance sheet shows as free assets over and above the amount of the property dividend the following items: capital, \$60,000, and surplus of \$52,687.79, a total of \$112,687.79. The affidavits further state that defendants were aware of plaintiff's claim but reasonably believed that it and all possible claims were more than amply provided for; that it was the uniform practice of the directors of the various Hartman corporations to determine what creditors there were before declaring a large dividend or closing a store; that the determination of the existence of creditors and the amounts of their claims was made by talking to the local accountants, searching the books, checking with the insurance companies, and by inquiry of local counsel as to the existence of unsettled claims or suits; that the purpose of the dividend was not to dispose of the corporate assets and injure creditors but to bolster the entire Hartman structure; that the directors did not dissolve the Hartman Company of Nebraska, nor had they any intention of doing so at any time during 1931; that the cause of the corporation's inability to pay creditors after December 31, 1931, was the totally unforeseen operating loss of \$120,122.47, which occurred in November and

operating loss of \$120,122.47, which occurred in November and any time during 1931; that the cause of the corporation's inability to pay creditors after December 31, 1931, was the totally unforeseen Company of Nebraska, nor had they any intention of doing so at Hartman structure; that the directors did not dissolve the Hartman corporate assets and injure creditors but to bolster the entire suits; that the purpose of the dividend was not to dispose of the industry of local counsel as to the existence of unsettled claims or searching the books, checking with the insurance companies, and by amounts of their claims was made by talking to the local accountants that the determination of the existence of creditors and the there were before declaring a large dividend or closing a store; of the various Hartman corporations to determine what creditors provided for; that it was the uniform practice of the directors believed that it and all possible claims were more than amply that defendants were aware of plaintiff's claim but reasonably \$72,687.79, a total of \$112,687.79. The affidavits further state dividend the following items: capital, \$60,000, and surplus of shows as free assets over and above the amount of the property was perfectly proper, legal and advisable; that the balance sheet the advice of legal counsel from three states; that the dividend which was attached to the affidavit of defendant Strass, and upon the balance sheet of the company as of October 31, 1931 (a copy of that the dividend was declared by them only after they had consulted both before and after the property dividend of November 9, 1931; affidavits tend to show that the Nebraska corporation was solvent Each of the defendants filed a separate affidavit. Their during that period.

study of the premises and was of the opinion that they were not worth over \$34,000 a year for the period 1932 to February 29, 1936, that their fair rental value would have been about \$26,712 per year, and that Hartman's would have lost on the lease \$8,333.33 during that period.

December, 1931. The affiants further stated that in their opinion the lease of the Hartman Company in Nebraska was an asset and not a liability. Defendant Sackett stated in his affidavit that he had negotiated leases for the Hartman organization covering stores in thirty-five mid-western cities, that the store in question had the best location in Omaha for a furniture store and that in his opinion it was a valuable lease. Defendant Yates, also a director, stated in his affidavit that the sale in December, 1931, proceeded in an orderly manner until the last week of that month; that advertisements prior to that time were mainly of a puffing character and indicated a greater discount from retail prices than was actually the case; that during the said last week a considerable quantity of furniture was sold at less than cost, which drastic cuts neither he nor the other directors had anticipated in November or the early part of December would be necessary. Each of the defendants stated in his affidavit that he and all of the other directors acted in good faith, with due diligence and care, and that none of the directors committed or intended to commit any fraud on Fellheimer or his assignee or anyone else, and that neither he nor any of the other directors anticipated or had any reason to anticipate the operating loss which occurred in November and December, 1931.

"The procedure [summary judgment] may not be used to impair right of trial by jury. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523. The purpose of the procedure is not to try an issue of fact as that term is used in law but rather to try whether there is an issue of fact between the parties within the legal meaning. The method is necessarily inquisitorial. The pleadings (important) are not controlling. If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded. If there is a material issue of fact it must be submitted to a jury. In Berick v. Curran, 55 R. I. 193,

December, 1931. The affiants further stated that in their opinion the lease of the Hartman Company in Nebraska was an asset and not a liability. Defendant Gackert stated in his affidavit that he had negotiated leases for the Hartman organization covering stores in thirty-five mid-western cities, that the store in question had the best location in Omaha for a furniture store and that in his opinion it was a valuable lease. Defendant Yates, also a director, stated in his affidavit that the sale in December, 1931, proceeded in an orderly manner until the last week of that month; that advertisements prior to that time were mainly of a palliating character and indicated a greater discount from retail prices than was actually the case; that during the said last week a considerable quantity of furniture was sold at less than cost, which drastic cuts neither he nor the other directors had anticipated in November or the early part of December would be necessary. Each of the defendants stated in his affidavit that he and all of the other directors acted in good faith, with due diligence and care, and that none of the directors committed or intended to commit any fraud on Weinheimer or his assignee or anyone else, and that neither he nor any of the other directors anticipated or had any reason to anticipate the operating loss which occurred in November and December, 1931.

"The procedure [summary judgment] may not be used to impair right of trial by jury. Diversity Litigating Corp. v. Hennrich, 370 Ill. 523. The purpose of the procedure is not to try an issue of fact as that term is used in law but rather to try whether there is an issue of fact between the parties within the legal meaning. The method is necessarily inquisitorial. The pleadings (important) are not controlling. If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded. If there is a material issue of fact it must be submitted to a jury. In York v. York, 55 N. E. 193,

179 Atl. 708, 710, this procedure is well described as, 'a two-edged weapon - useful if it precludes the interposition of defenses for delay, but dangerous if it deprives a defendant of the opportunity to have a trial of seriously contested questions of fact or law.'

"The authorities say affidavits for plaintiff should be construed strictly, those for defendants liberally. Shientag, 4 Fordham L. R. 186; Gleason v. Hoeke, 5 App. Dist. of Col. 1, 4-5; Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320; Wells v. Alropa Construction Corp., 82 Fed. (2d) 887, 889, are cited.

"Plaintiff's right to judgment should be free from doubt. Lord Esher in Sheppards & Co. v. Wilkinson & Jarvis, 6 T. L. R. 13, and many other cases.

"Even if defense papers are found insufficient, judgment should not be ordered unless plaintiff's affidavit (strictly construed) leaves no question of defendant's liability. People for use of Dyer v. Sanculius, 284 Ill. App. 463, 474-475; Weiss v. Goldberger, 209 App. Div. 615, 205 N. Y. S. 1, 3; 4 Fordham L. R. 186, 216; Wm. H. Frear & Co., Inc. v. Bailey, 127 Misc. 79, 214 N. Y. S. 675, 677.

"If the defense is 'arguable,' 'apparent,' made in 'good faith' it should be submitted to a jury. Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320. The court is bound to accept statement of facts as true when alleged in defendant's affidavits. The whole record must be considered." (Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, 470, 471.)

Plaintiff states that "the count on which plaintiff relies for her [summary] judgment is count two of the amended complaint. The basis of count two is that the defendants, who were directors

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Plaintiff states that "the count on which plaintiff relies for her [summary] judgment is count two of the amended complaint. The basis of count two is that the defendants, who were directors

of the Hartman Furniture & Carpet Company, a Nebraska corporation, decided to cause their corporation to be dissolved and that, having decided to cause the dissolution of the corporation, they came within the provisions of Section 107, Article I, of Chapter 24 of the Statutes of the State of Nebraska, relating to corporations, which provides that upon dissolution of a corporation by expiration of its charter or otherwise, the directors are trustees of the creditors and stockholders of the corporation, and it then becomes their duty to collect and pay the outstanding debts and divide among the stockholders the money and property that shall remain after the payment of debts and necessary expenses; that under this Nebraska statute the directors are liable to the creditors to the extent of the corporate property and effects which come into the directors' hands (statute set out in full * * *) [post] that the defendant directors failed to carry out their contractual obligation to the creditors, and particularly to plaintiff, in dissolving the corporation, and that they ignored the mandate of the statute to pay creditors and necessary expenses first and stockholders afterwards but in effect reversed the process and paid stockholders first and did not have enough left over to pay creditors and necessary expenses; that by reason of the failure of the defendants faithfully to carry out their contract implied by the Nebraska law, plaintiff was damaged and defendants are liable to her. In other words, the action is not simply one involving the duties and obligations of directors who improperly pay out a dividend, but it involves the obligations and liabilities of directors where they cause a corporation to be dissolved, and their liability is a statutory liability and not limited to the common law liability for improper dividends."

Plaintiff further states that "this is not an action against defendants based upon either their lack of good faith or any negligence on their part. It is an action to hold them liable for their

of the Hartman Furniture & Carpet Company, a Nebraska corporation, decided to cause their corporation to be dissolved and that, having decided to cause the dissolution of the corporation, they came within the provisions of Section 107, Article I, of Chapter 24 of the Statutes of the State of Nebraska, relating to corporations, which provides that upon dissolution of a corporation by expiration of its charter or otherwise, the directors are trustees of the creditors and stockholders of the corporation, and it then becomes their duty to collect and pay the outstanding debts and divide among the stockholders the money and property that shall remain after the payment of debts and necessary expenses; that under this Nebraska statute the directors are liable to the creditors to the extent of the corporate property and effects which come into the directors' hands (statute set out in full * * *) [post] that the defendant directors failed to carry out their contractual obligation to the creditors, and particularly to plaintiff, in dissolving the corporation, and that they ignored the mandate of the statute to pay creditors and necessary expenses first and stockholders afterwards but in effect reversed the process and paid stockholders first and did not have enough left over to pay creditors and necessary expenses; that by reason of the failure of the defendants faithfully to carry out their contract implied by the Nebraska law, plaintiff was damaged and defendants are liable to her. In other words, the action is not simply one involving the duties and obligations of directors who improperly pay out a dividend, but it involves the obligations and liabilities of directors when they cause a corporation to be dissolved, and their liability is a statutory liability and not limited to the common law liability for improper dividends."

Plaintiff further states that "this is not an action against defendants based upon either their lack of good faith or any negligence on their part. It is an action to hold them liable for their

breach of the implied contract imposed by the Nebraska statute, and the good faith or bad faith of the defendants is not the real issue."

Section 107, Article I, of Chapter 24, Statutes of Nebraska 1929, upon which plaintiff relies, reads as follows:

"Upon the dissolution, by the expiration of the term of its charter, or otherwise, of any corporation now existing, or hereafter created, and unless other persons be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporations, acting last before the time of its dissolution by whatever name they may be known in law, and the survivors of them, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts, and divide among the stockholders the moneys and property that shall remain, in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses; and the persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name, and shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands; and no suit against any such corporation shall abate in consequence of such dissolution, and said trustees may be made parties by scire facias; and all liens of judgments and decrees of any courts of equity, existing at the time of such dissolution, either in favor of or against such corporation, shall continue in force in the same manner as if such dissolution had not taken place: Provided, in case of the death, resignation, inability or refusal to act, of the directors or managers aforesaid, or the survivors

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Section 107, Article I, of Chapter 24, Statutes of Nebraska 1929, upon which plaintiff relies, reads as follows: "Upon the dissolution, by the expiration of the term of its charter, or otherwise, of any corporation now existing, or hereafter created, and unless other persons be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporations, acting last before the time of its dissolution by whatever name they may be known in law, and the survivors of them, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts, and divide among the stockholders the money and property that shall remain in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses; and the persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name, and shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands; and no suit against any such corporation shall be brought in consequence of such dissolution, and said trustees may be and parties by scire facias; and all liens of judgments and decrees of any courts of equity, existing at the time of such dissolution, either in favor of or against such corporation, shall continue in force in the same manner as if such dissolution had not taken place: PROVIDED, in case of the death, resignation, inability or refusal to act, of the directors or managers for said, or the survivors

thereof, the district court of the proper county may, on the application of any persons interested, appoint trustees to fill the vacancy, with full power to perform the duties aforesaid."

Defendants state that "we are not contending that plaintiff cannot recover under Count I of her complaint if she proves fraud as alleged therein upon a trial of the case or even negligence (if she amends her complaint) but we say that a summary judgment is improper under the complaint and there can be no recovery under Count II thereof." In Shaw v. Robinson, 50 Neb. 403, 414, 415, the court made the following interpretation of Section 107: "We are of the opinion that the dissolution contemplated in the above statute is the voluntary dissolution provided for by the two-thirds vote of the members of the corporation under section 134, chapter 16, Compiled Statutes, or the expiration of limitation of charter, the loss of membership, the surrender of its franchise as a corporation, or forfeiture by non-user or misuser described in 2 Morawetz, Private Corporations, p. 1005, 2 Beach, Private Corporations, secs. 780, 782." Defendants have made a strong argument in support of their contention that Section 107 would not apply even if this appeal were to be determined upon plaintiff's pleading and proof. Defendants state that the sole purpose of the Nebraska statute is to provide for the transfer of title of the corporation's assets upon its de jure dissolution; that the section did not intend to create a trust relationship between the corporation's creditors and its directors whereby the former could compel the latter to account for alleged wrongs committed by the directors during their terms of office at a time prior to dissolution; that Section 107 does not intend to establish a standard of conduct fixing the duties of the directors while managing the corporation's affairs; that plaintiff's pleading, count II, alleges "that the cessation of business, sale or other disposal of all assets, and the removal of all officers and directors from the State of Nebraska

thereof, the district court of the proper county may, on the application of any persons interested, appoint trustees to fill the vacancy, with full power to perform the duties aforesaid."

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on said 31st day of December, 1931, constituted a dissolution of said corporation," within the meaning of Section 107, but that even if this theory of plaintiff could be sustained, nevertheless, she has not shown that the directors on December 31, 1931, or at any time subsequent thereto, came into possession of any assets belonging to the Nebraska corporation. Plaintiff has not made a very satisfactory answer to defendant's argument. Her counsel state that "it would be difficult to duplicate a more careful plan of systematic looting of a corporation with complete disregard of the claims of creditors and of the rights of this plaintiff than was perpetrated by defendants." Defendants answer this statement by saying that if **they**, as directors, were guilty of mismanagement and fraud, they would be liable for such conduct, but not under Section 107, and that in any event the charge involves a disputed question of fact. Plaintiff contends that defendants performed such acts as brought them within the scope of Section 107; that the facts show "a calculated plan to cause dissolution and the winding up of the corporation, and the Nebraska statute is therefore applicable." Defendants answer this contention by stating that the said section does not apply even under plaintiff's theory of fact, but that in any event the charge involves disputed questions of fact. We have concluded, however, that it is not necessary for us to now pass upon the question as to whether or not Section 107 applies to plaintiff's case as alleged in count II, and that it may not be necessary for us to pass upon that question should this case come before us again.

In our judgment the contention of defendants that in any view of the question as to the application of Section 107 there are material issues of fact that must be submitted to a jury is a meritorious one. Both parties agree that the corporation was solvent at the time the dividend was declared. Plaintiff charges

on said first day of December, 1931, constituted a dissolution of said corporation," within the meaning of Section 107, but that even if this theory of plaintiff could be sustained, nevertheless, she has not shown that the directors on December 31, 1931, or at any time subsequent thereto, came into possession of any assets belonging to the Nebraska corporation. Plaintiff has not made a very satisfactory answer to defendant's argument. Her counsel state that "it would be difficult to duplicate a more careful plan of systematic looting of a corporation with complete disregard of the claims of creditors and of the rights of this plaintiff than was perpetrated by defendants." Defendants answer this statement by saying that if they, as directors, were guilty of mismanagement and fraud, they would be liable for such conduct, but not under Section 107, and that in any event the charge involves a disputed question of fact. Plaintiff contends that defendants performed such acts as brought them within the scope of Section 107; that the facts show "a calculated plan to cause dissolution and the winding up of the corporation, and the Nebraska statute is therefore applicable." Defendants answer this contention by stating that the said section does not apply even under plaintiff's theory of fact, but that in any event the charge involves disputed questions of fact. We have concluded, however, that it is not necessary for us to now pass upon the question as to whether or not Section 107 applies to plaintiff's case as alleged in count II, and that it may not be necessary for us to pass upon that question should this case come before us again.

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in count II that defendants "fraudulently connived together and entered into and engaged in a course of conduct designed and contemplated to dispose of the assets of the Hartman Furniture and Carpet Company, a Nebraska Corporation, and to remove said assets from Nebraska and put said assets beyond the reach of creditors of said corporation, and that these directors caused said Company to become insolvent in that the action of said directors and officers resulted in the inability of said Nebraska Corporation to pay its debts as they matured," etc. Defendants deny that they entered into or engaged in any such conspiracy. An important question of fact is, Was the corporation made insolvent by the action of the directors in declaring the dividend. Still another question of fact is, Did defendants act with due care and in good faith in declaring the dividend. Whether or not defendants decided or intended to dissolve the corporation, as claimed by plaintiff, also involves a controverted question of fact. Other material questions of fact will likely develop upon a trial of the cause. Plaintiff contends that "the application of any rule of 'horse sense' and common understanding demonstrates clearly that not only was the corporation made insolvent by the action of the Board on November 9, but also that it was intended to be insolvent," and plaintiff insists that "defendants cannot now be permitted to tax the credulity of the court by their assertions to the contrary and to surround the natural consequences of their conduct with a cloak of good faith." It is not our province upon this appeal to express any opinion as to the weight of the evidence or the credibility of the affiants. If, as plaintiff contends, "it would be difficult to duplicate a more careful plan of systematic looting of a corporation with complete disregard of the claims of creditors and of the rights of this plaintiff than was perpetrated by defendants," plaintiff will undoubtedly prevail upon a trial of the cause before a jury if she proves the said plan of looting, and in this connection

in count II that defendants "intentionally conspired together and entered into and engaged in a course of conduct designed and contemplated to dispose of the assets of the Western Furniture and Carpet Company, a Nebraska Corporation, and to remove said assets from Nebraska and put said assets beyond the reach of creditors of said corporation, and that these defendants caused said company to become insolvent in that the action of said directors and officers resulted in the inability of said Western Furniture and Carpet Company to pay its debts as they matured," etc. Defendants deny that they entered into or engaged in any such conspiracy. An important question of fact is, was the corporation made insolvent by the action of the directors in declaring the dividend. Still another question of fact is, did defendants act with due care and in good faith in declaring the dividend. Whether or not defendants acted or intended to dissolve the corporation, as claimed by plaintiff, also involves a controverted question of fact. Other material questions of fact will likely develop upon a trial of the cause. Plaintiff contends that "the application of my rule of 'horse sense' and common understanding demonstrates clearly that not only was the corporation made insolvent by the action of the board on November 9, but also that it was intended to be insolvent," and plaintiff insists that "defendants cannot now be permitted to tax the credibility of the court by their assertions to the contrary and to surround the natural consequences of their conduct with a cloud of good faith." It is not our province upon this appeal to express any opinion as to the weight of the evidence or the credibility of the affiants. If, as plaintiff contends, "it would be difficult to duplicate a more careful plan of systematic looting of a corporation with complete disregard of the claims of creditors and of the rights of this plaintiff than was perpetrated by defendants," plaintiff will undoubtedly prevail upon a trial of the cause before a jury if she proves the said plan of looting, and in this connection

it will be remembered that defendants concede that plaintiff can recover if she proves the allegations of count I.

Defendants have raised and argued a number of other contentions, but it is unnecessary for us to pass upon the same.

The summary judgment of the Superior court of Cook county is reversed, and the cause is remanded with directions that defendants be allowed a trial by jury.

JUDGMENT REVERSED, AND
CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

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316 I.A. 450¹

41989

FRANK KOS, a minor, by EVELYN
KOS, his mother and next
friend,

Appellant,

v.

FRANK LINDEN,

Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, sued to recover damages for injuries alleged to have been sustained by him when he was struck by a motor vehicle owned and driven by defendant. A jury returned a verdict of not guilty and plaintiff appeals from a judgment entered upon the verdict.

No point is made as to the pleadings. Plaintiff's theory of fact is, that "1. The plaintiff, a 15-year-old pedestrian, was crossing a public highway (Western Avenue) in the City of Chicago, from east to west, at, or near, the south crosswalk of 25th Street, in daylight (about 9:30 A.M.) on a rainy day. 2. After safely reaching the raised platform of the 'safety island', and seeing no auto within the north-bound street car track, upon looking to the south before leaving the so-called 'safety island', plaintiff proceeded on until in between the north-bound and south-bound street car tracks, where he looked to the north to ascertain if there was any south-bound traffic. 3. There being no south-bound traffic plaintiff resumed his crossing and was struck by defendant's automobile going north in the south-bound track - no previous warning of bell or horn of any kind having been given, at a speed of 40 miles per hour - with the resultant injuries complained of, and the incidental expenses claimed." Defendant's theory is that before and at the time of the accident he was proceeding northward on the northbound street car track; that he

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No point is made as to the pleadings. Plaintiff's theory of fact is, that "I, The Plaintiff, a 15-year-old pedestrian, was crossing a public highway (Western Avenue) in the City of Chicago, from east to west, at, or near, the south crosswalk of 25th Street, in daylight (about 2:30 A.M.) on a rainy day. After safely reaching the raised platform of the 'safety island' and seeing no auto within the north-bound street car track, when looking to the south before leaving the so-called 'safety island,' plaintiff proceeded on until in between the north-bound and south-bound street car tracks, where he looked to the north to ascertain if there was any south-bound traffic. There being no south-bound traffic plaintiff resumed his crossing and was struck by defendant's automobile going north in the south-bound track - no previous warning of bell or horn or any kind having been given at a speed of 40 miles per hour - with the resultant injuries complained of, and the incidental expenses claimed." Defendant's theory is that before and at the time of the accident he was proceeding northward on the north-bound street car track; that he

first saw plaintiff when his car was about 200 feet south of plaintiff; that plaintiff was then standing upon the safety island and was facing north; that he had an umbrella under his arm; that when defendant first saw plaintiff he sounded his horn as a warning; that when defendant's car was about ten feet south of plaintiff, the latter turned to the west and started walking across the street in front of defendant's car; that defendant applied his brakes and swerved the car slightly to the left but that the right front fender and lamp came in contact with plaintiff; that defendant stopped the car in not more than 20 feet after the impact; that as defendant was approaching 25th street and before he reached the safety island the car was going 25 or 30 miles an hour. After the accident defendant picked up the boy, put him in defendant's car and took him to the hospital.

The following are the contentions made by plaintiff: "I. The Court erred in its rulings upon the admission of evidence. II. The Court committed prejudicially reversible error in the instructing of the jury. III. Counsel for the defendant, in the trial of the case, was guilty of improper conduct, calculated to arouse the passion and prejudice of the jury, to the prejudice of the plaintiff."

It will be noticed that the able and experienced counsel for plaintiff do not contend that the verdict is against the manifest weight of the evidence. Indeed, they make no contention that the verdict was not fully justified by the evidence. However, before passing upon the points raised by plaintiff we have seen fit to read carefully the entire evidence and as a result of our consideration of the same we have reached the conclusion that any honest, intelligent jury would have been obliged to return a verdict of not guilty under the facts and circumstances in evidence. While we are not required, on this appeal, to consider what damages

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The following are the contentions made by plaintiff: I. The Court erred in its rulings upon the admission of evidence, II. The Court committed prejudicially reversible error in the instructions of the jury, III. Counsel for the defendant, in the trial of the case, was guilty of improper conduct, calculated to arouse the passion and prejudice of the jury, to the prejudice of the plaintiff.

It will be noticed that the able and experienced counsel for plaintiff do not contend that the verdict is against the law. Indeed, they make no contention that the verdict was not fully justified by the evidence. However, before passing upon the points raised by plaintiff we have seen fit to read carefully the entire evidence and as a result of our consideration of the same we have reached the conclusion that any honest, intelligent jury would have been obliged to return a verdict of not guilty under the facts and circumstances in evidence. While we are not required, on this appeal, to consider the merits

were sustained by plaintiff as a result of the accident, we have no doubt that certain evidence that bore solely upon plaintiff's alleged injuries tended strongly to injure his case. It appears that while plaintiff was in the court room during the trial he used a crutch, and that he used it in taking the witness stand; that he also used the crutch in going about the court building. Plaintiff testified that he had used one crutch "just about two weeks. Before that I used two crutches;" that he used a crutch whenever he walked; "my leg doesn't exactly give way but it isn't very strong, so that I couldn't walk without it. I couldn't run or anything of that sort." Defendant offered evidence that proved beyond a reasonable doubt that plaintiff returned to his home on the evening of the day that he testified; that five minutes after his return he left his home and walked, without a crutch, seven blocks to a moving picture theatre. Neither plaintiff nor any other witness attempted to rebut this evidence and plaintiff's counsel was forced to take the position before the trial court that this evidence should not be admitted because it merely impeached plaintiff upon an immaterial matter. In support of the contention that the court erred in its ruling upon the admission of evidence plaintiff argues that the trial court erred in admitting this evidence, as it merely impeached plaintiff upon an immaterial collateral matter. The following answer of defendant to plaintiff's argument meets with our approval: "This boy came before the jury using a crutch. He said he couldn't walk without a crutch. He said he used it to help both legs. He said he did not know whether he could walk on his left leg without a crutch because he had never tried. In any event he wanted the jury to believe that he was so crippled that he could not get along without a crutch. He did that to gain their sympathy and fool them and defraud the defendant. * * * He could walk without it. He knew that he could but swore that he

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couldn't. His counsel says this was immaterial and the defendant had no right to show that he was deliberately deceiving the jury in an effort to defraud the defendant." Plaintiff further contends that the error of the trial court in admitting defendant's evidence was aggravated by the fact that "after defendant closed his case in chief, plaintiff then attempted to introduce, in rebuttal of the defendant's motion pictures of the functioning of the right leg, a group of X-ray photographs of the bony structure of the same right leg taken from the accident thereto clear up to the time of trial," and that the trial court erred in sustaining defendant's objection to ^{this} ~~photographs~~ evidence. There is no merit in this contention. The trial court properly ruled that "the only question on rebuttal in regard to this evidence, as I take it, is a question of whether he did or didn't walk without a crutch. And not the condition" of the leg.

As to plaintiff's point II, that the court committed reversible error in instructing the jury, plaintiff first contends that the court erred in giving to the jury at the instance of defendant seven instructions bearing upon the subject of plaintiff's contributory negligence, when only one instruction was given upon behalf of plaintiff upon the same subject. We find, upon examination of the record, that plaintiff asked the court to give fifteen instructions to the jury and that the court gave all of them. The court gave, at the instance of defendant, fourteen instructions. We have seldom, if ever, had before us a record in a personal injury case where the plaintiff's given instructions outnumbered the defendant's given instructions. Some of plaintiff's instructions were long, and there is no point made that they did not fully and fairly present to the jury plaintiff's theory of law. Plaintiff does not complain that the seven instructions do not correctly state the law, but it is argued that there was needless repetition that

plaintiff's counsel says this was immaterial and the defendant had no right to show that he was deliberately deceiving the jury in effort to defraud the defendant." Plaintiff further contends that the error of the trial court in admitting defendant's evidence was aggravated by the fact that "after defendant closed his case in fact, plaintiff then attempted to introduce, in rebuttal of the defendant's motion pictures of the investigation of the night leg, group of X-ray photographs of the bony structure of the same right leg taken from the accident there close up to the time of trial," and that the trial court erred in sustaining defendant's objection to this evidence. There is no merit in this contention. The trial court properly ruled that "the only question on rebuttal in regard to this evidence, as I take it, is a question of whether he did or didn't walk without a crutch. And not the condition" of the leg. As to plaintiff's point II, that the court committed reversible error in instructing the jury, plaintiff first contends that the court erred in giving to the jury at the instance of defendant seven instructions bearing upon the subject of plaintiff's contributory negligence, when only one instruction was given upon behalf of plaintiff upon the same subject. We find, upon examination of the record, that plaintiff asked the court to give five or instructions to the jury and that the court gave all of them. The court, at the instance of defendant, fourteen instructions. We have seldom, if ever, had before us a record in a personal injury case where the plaintiff's given instructions outnumbered the defendant's given instructions. Some of plaintiff's instructions were long, and there is no point made that they did not fully and fairly present to the jury plaintiff's theory of law. Plaintiff does not complain that the seven instructions do not correctly state law, but it is argued that there was needless repetition that

brought the question of the exercise of care by plaintiff too prominently before the jury. Six of the seven instructions presented different aspects of the question of plaintiff's contributory negligence and one of the seven instructions was a repetition of another. In Carson, Pirie, Scott & Co. v. Chicago Rys. Co., 309 Ill. 346, 352, the court states:

"There were five instructions given stating the rule of law that required Martin to exercise ordinary care for his own safety and advising the jury that the plaintiff could not recover if Martin failed to exercise such care. The instructions correctly stated the law, and the objection made is that there was needless repetition, bringing the question of the exercise of care by Martin too prominently before the jury. That was one of the material issues in the case, and while needless repetition may give undue prominence to some matter to which the instructions relate, these instructions presented different aspects of the question. The elaboration of the rule in different instructions did not add anything material to the defense, but as there was nothing incorrect in them they are not ground for reversal."

We find no substantial merit in plaintiff's contention that the court erred in giving to the jury, at the instance of defendant, instructions Nos. 9, 10, 11, 15 and 16.

Plaintiff contends that counsel for defendant was guilty of improper conduct calculated to arouse the passion and prejudice of the jury to the injury of plaintiff. We have carefully considered the argument of plaintiff's counsel in support of this contention and we are satisfied that there was nothing in the conduct of defendant's counsel that had any effect in bringing about the verdict returned by the jury. This case was tried by an able and careful judge. Plaintiff lost the verdict because it clearly appeared from the evidence that his claim lacked merit.

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Hys. Co., 309 Ill. 346, 352, the court states:

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that required Martin to exercise ordinary care for his own safety

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conduct of defendant's counsel that had any effect in bringing

about the verdict returned by the jury. This case was tried by

an able and careful judge. Plaintiff lost the verdict because it

clearly appeared from the evidence that his claim lacked merit.

The judgment of the Superior court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

The judgment of the Superior Court of Cook County should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

42141

316 I.A. 450²

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

ROSA WEDGE,

Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On July 23, 1941, defendant was arrested by the village marshal of the Village of Westchester, Cook county, Illinois, for failure to stop at a stop sign as required by the statute of the State. When the case was called for trial before a police magistrate of said Village defendant requested a change of venue, which was granted, and the case was sent to a police magistrate of Broadview. When the case was there called for trial, defendant requested a trial by a jury; a jury was called, the evidence heard, and a verdict was returned finding defendant guilty as charged and a fine of five dollars was assessed. Defendant prayed an appeal to the Criminal court of Cook county from a judgment entered on the verdict, and thereafter the case came on for trial in that court before Judge Dunne, at which time defendant requested that the case be submitted to the court without a jury, which was done. The trial court, after hearing the evidence submitted by both sides, "found the defendant guilty as charged. Fine of \$5.00 and all costs imposed by the Village of Westchester affirmed." Defendant sues out this writ of error to review the judgment of the Criminal court.

Defendant contends that "the evidence in this case taken as a whole does not establish the defendant's guilt beyond a reasonable doubt." The main argument in support of this contention is that the village marshal arrested her "not because she failed to stop at a stop sign, but merely out of spite and out of an unfriendly feeling that he for some time harbored against

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

ROSA WEDGE,

Plaintiff in Error.

ERROR TO CRIMINAL COURT

OF COOK COUNTY,

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ant requested a trial by a jury; a jury was called, the evidence

heard, and a verdict was returned finding defendant guilty as

charged and a fine of five dollars was assessed. Defendant

prayed an appeal to the Criminal Court of Cook county from a

judgment entered on the verdict, and thereafter the case came on

for trial in that court before Judge Dunning, at which time defend-

ant requested that the case be submitted to the court without a

jury, which was done. The trial court, after hearing the evidence

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tion is that the village marshal arrested her "not because she

failed to stop at a stop sign, but merely out of spite and out

of an unfriendly feeling that he for some time harbored against

her." It is sufficient to state in answer to this argument that if the finding of guilty was based upon the testimony of the village marshal alone there might be some force in the argument, but the record shows that the testimony of the village marshal that defendant failed to stop her automobile at the stop sign located at Westchester Boulevard and Roosevelt Road, a State highway, is fully corroborated by the testimony of T. J. Bullock and John Parker, two disinterested witnesses. Neither was a friend nor an acquaintance of the village marshal at the time in question and both were subpoenaed to testify in the case. While defendant bitterly attacks the testimony of the village marshal she makes little reference to the testimony of Bullock and Parker. Defendant had conducted a tavern in Hillside for about six years and she closed it on the morning in question at 3 o'clock. The alleged offense took place about 3:30 a.m., when she and one Ted Bowden were riding in her automobile. She testified that "we were just riding." She had known Bowden for years. He was a guitar player who entertained defendant's customers on Saturday nights. Defendant did not pay him for the entertainment but he made "money by passing the hat;" defendant allowed him to keep whatever money he obtained in that way. Defendant testified that when she arrived at Roosevelt Road, where there was a stop sign, she came to a complete stop. Bowden, alone, corroborated this testimony.

"Where a cause is tried without a jury the law has committed to the trial judge the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting this court will not substitute its judgment for that of the trial court. People v. Overbey, 362 Ill. 488; People v. Sciales, 353 id. 169." (People v. Ristau, 363 Ill. 583, 589.)

Defendant has had two trials upon the instant charge. In

her." It is sufficient to state in answer to this argument that if the finding of guilty was based upon the testimony of the village marshal alone there might be some force in the argument, but the record shows that the testimony of the village marshal that defendant failed to stop her automobile at the stop sign located at Westchester Boulevard and Roosevelt Road, a state highway, is fully corroborated by the testimony of T. J. Bullock and John Parker, two disinterested witnesses. Bullock was a friend nor an acquaintance of the village marshal at the time in question and both were subpoenaed to testify in the case. While defendant bitterly attacks the testimony of the village marshal she makes little reference to the testimony of Bullock and Parker. Defendant had conducted a tavern in Hillside for about six years and she closed it on the morning in question at 3 o'clock. The alleged offense took place about 3:30 a.m., when she and one Ted Bowden were riding in her automobile. She testified that "we were just riding." She had known Bowden for years. He was a writer player who entertained defendant's customers on Saturday nights. Defendant did not pay him for the entertainment but he made "money by passing the hat;" defendant allowed him to keep whatever money he obtained in that way. Defendant testified that when she arrived at Roosevelt Road, where there was a stop sign, she came to a complete stop. Bowden, alone, corroborated this testimony.

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Defendant has had two trials upon the instant charge. In

the justice court she demanded a jury and the jury found her guilty of the charge. In the Criminal court she requested that the case be tried by the court without a jury and the trial judge found her guilty of the charge. After a careful consideration of the record we have reached the conclusion that the finding of the trial court was fully justified under the evidence.

Defendant contends that the only charge against her in the Criminal court was that she failed to stop at a stop sign; that the rate of speed she was traveling at the time was not material in the prosecution of the sole charge against her and that the trial court erred in permitting the prosecution to introduce evidence as to the rate of speed she was traveling at the time in question. There is not the slightest merit in the contention. The rate of speed at which she was traveling was clearly a part of the res gestae. The evidence for the prosecution tended to show that defendant, prior to the time that she reached the point in question, was driving her automobile at a high rate of speed and that the village marshal, who was following her car in a squad car, "opened the siren upon the squad car," but that defendant failed to stop and failed to reduce the speed of her car and passed through the stop sign at a high rate of speed. The evidence bearing upon the question of speed was also material as it tended to show an intent by defendant to disregard the warning sign. She was familiar with the stop sign at the intersection.

We find no merit in the instant writ of error and the judgment of the Criminal court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

42269

316 I.A. 451

DOROTHY E. THORNE,
Appellee,

v.

SOLVE K. THORNE,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On November 6, 1941, plaintiff obtained a decree of divorce in the above entitled cause. On January 19, 1942, defendant filed a "Petition for Vacation of Decree." On January 19, 1942, an order was entered denying the prayer of the petition. Defendant appeals from that order.

We have seldom had before us an appeal that was so lacking in merit. The present counsel for defendant, who did not represent him upon the trial of the cause, ask that the decree of divorce be reversed and the cause remanded, although the appeal was taken from the order of January 19, 1942. Two points are raised in support of their contention that the decree of November 6, 1941, be reversed: one, "The testimony of the plaintiff and her two witnesses was insufficient as a matter of law to authorize the trial court to make a finding in the decree that defendant was guilty of extreme and repeated cruelty as alleged," and the said testimony was "false and untrue;" and, two, "The court lacked jurisdiction to pass on the property rights of the litigants herein."

On November 5, 1941, plaintiff filed her amended complaint for divorce, in which she alleged that the defendant had been guilty of extreme and repeated cruelty toward her, in that: On August 15, 1941, he, without cause, struck her about the body violently, injuring her and bruising her; that on September 23, 1941, defendant, without cause, struck her about the body violently, injuring her and bruising her; that on September 24, 1941, he threatened her with physical violence; that on October 27, 1941, he, without

DOROTHY L. THORNTON
Appellee,

v.

ROBERT K. THORNTON
Appellant.

APPEAL FROM SUPERIOR COURT

ST. JOHNS COUNTY.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

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fendant filed a "Petition for Vacation of Decree." On January

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divorce be reversed and the cause remanded, although the appeal

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6, 1941, be reversed: one, "The testimony of the Plaintiff and

her two witnesses was insufficient as a matter of law to authorize

the trial court to make a finding in the decree that defendant

was guilty of extreme and repeated cruelty as alleged," and the

said testimony was "false and untrue;" and, two, "The court lacked

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On November 5, 1941, Plaintiff filed her amended complaint

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juring her and bruising her; that on September 23, 1941, defendant,

without cause, struck her about the body violently, injuring her

and bruising her; that on September 24, 1941, he threatened her

with physical violence; that on October 7, 1941, he, without

cause, struck her about the arm and thrust her roughly aside, injuring and bruising her. On the same day that the amended complaint was filed defendant filed his answer, in which he denied that he had been guilty of the acts of cruelty charged in the complaint, and at the same time the parties filed a written stipulation that the cause be set down for an immediate hearing; and still upon the same day, the cause came on for hearing before Judge Sabath. Defendant was represented by Attorney Bryant, who has taken no part in this appeal. Plaintiff testified that she separated from defendant; that he struck her on September 23, 1941, and struck her again on October 27, 1941, and that on each of these occasions she gave him no cause to strike her. She also testified that he was cruel to her at other times. Her testimony as to the said acts of cruelty was corroborated by two witnesses. Defendant's counsel did not cross-examine plaintiff nor either of her witnesses. Defendant offered no evidence in rebuttal. While plaintiff was upon the stand the following occurred: "Q. You have entered into an agreement with your husband whereby the real estate at 7530 Kedvale Avenue, Skokie, is to be awarded to him, subject to all liens and incumbrances, and you are to quit-claim all right, title and interest in and to that property and he is to pay you the sum of One Thousand dollars in settlement of your interest; three hundred dollars in cash, which you acknowledge receiving in open court, and the remaining Seven Hundred dollars payable at the rate of Fifty dollars a month? A. Yes. Q. The household furniture is to be awarded to you also? A. Yes. Q. You are waiving all claims for alimony, attorney's fees and court costs? A. Yes. Q. You understand if you waive your claims now, you cannot change your mind later? A. Yes. Q. You are waiving all claims against him except the Seven hundred dollars balance of the Thousand dollars? A. Right." Defendant's counsel did not

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 and struck her again on October 27, 1941, and that on each of these
 occasions she gave him no cause to strike her, she also testified
 that he was cruel to her at other times. Her testimony as to the
 said acts of cruelty was corroborated by two witnesses. Defend-
 ant's counsel did not cross-examine plaintiff nor either of her
 witnesses. Defendant offered no evidence in rebuttal. While
 plaintiff was upon the stand the following occurred: Q. You
 have entered into an agreement with your husband whereby the real
 estate at 7730 Kedvale Avenue, Chicago, is to be awarded to him,
 subject to all liens and incumbrances, and you are to contribute
 all right, title and interest in and to that property and he is
 to pay you the sum of One Thousand dollars in settlement of your
 interest; three hundred dollars in cash, which you acknowledge
 receiving in open court, and the remaining seven hundred dollars
 payable at the rate of fifty dollars a month? A. Yes. Q. The
 household furniture is to be awarded to you also? A. Yes. Q.
 You are waiving all claims for alimony, attorney's fees and court
 costs? A. Yes. Q. You understand if you waive your claims now,
 you cannot change your mind later? A. Yes. Q. You are waiving
 all claims against him except the seven hundred dollar balance
 of the Thousand dollars? A. Right. Defendant's counsel did not

examine plaintiff in reference to her statement as to the agreement between the parties, nor did he intimate to the court in any way that the statement of plaintiff as to the agreement was not correct. Upon the following day the following decree was entered:

"This cause coming on to be heard upon the plaintiff's amended complaint, and the answer thereto of the defendant, and upon the stipulation of the parties hereto, by their respective attorneys, that this cause might come on for an immediate hearing, and the plaintiff appearing in her own proper person and by Harry X. Cole, her attorney, and the defendant appearing by James R. Bryant, his attorney, and the court having heard the testimony of the witnesses duly sworn and examined in open court, and upon other evidence offered by plaintiff in support of her complaint (a certificate of which evidence having been duly signed and sealed is filed herein and made a part hereof), and the court having heard the arguments of counsel for the respective parties, and being fully advised in the premises, Doth Find:

"That it has jurisdiction of the parties hereto and the subject matter hereof; that the plaintiff is and since prior to the filing of said complaint has been an actual resident of Cook County, and has been a resident of the State of Illinois for over one whole year next before the filing of the complaint herein; that the parties hereto were lawfully joined in marriage on or about the 30th day of November, 1935, at Chicago, Illinois; that no children were born of the said marriage; that subsequent to their intermarriage the defendant had been guilty of extreme and repeated cruelty toward plaintiff, on to-wit: the 23rd day of September, 1941, and on to-wit: the 27th day of October, 1941, as alleged in plaintiff's amended complaint.

"The court further finds that the parties hereto are the holders of title in joint tenancy to the home formerly occupied by the parties hereto at 7530 Kedvale, Skokie, Illinois, subject to

examine plaintiff in reference to her statement as to the agreement between the parties, nor did he indicate to the court in any way that the statement of plaintiff as to the agreement was not correct. Upon the following day the following decree was entered:

"This cause coming on to be heard upon the plaintiff's amended complaint, and the answer thereto of the defendant, and upon the stipulation of the parties hereto, by their respective attorneys, that this cause might come on for an immediate hearing, and the plaintiff appearing in her own proper person and by Henry X. Cole, her attorney, and the defendant appearing by James E. Bryant, his attorney, and the court having heard the testimony of the witnesses duly sworn and examined in open court, and upon other evidence offered by plaintiff in support of her complaint (a certificate of which evidence having been duly signed and sealed as filed hereto and made a part hereof), and the court having heard the arguments of counsel for the respective parties, and being fully advised in the premises, Doth Find:

"That it has jurisdiction of the parties hereto and the subject matter hereof; that the plaintiff is and since prior to the filing of said complaint has been an actual resident of Cook County and has been a resident of the State of Illinois for over one whole year next before the filing of the complaint hereto; that the parties hereto were lawfully joined in marriage on or about the 20th day of November, 1935, at Chicago, Illinois; that no children were born of the said marriage; that assignment to their intestate the defendant had been guilty of extreme and repeated cruelty toward plaintiff, on to-wit: the 2nd day of September, 1941, and on to-wit: the 27th day of October, 1941, as alleged in plaintiff's amended complaint.

"The court further finds that the parties hereto are the holders of title in joint tenancy to the real property occupied by the parties hereto at 7530 Kedzie, Chicago, Illinois, subject to

mortgage executed by the parties hereto; that plaintiff has possession of the household furniture formerly used by the parties hereto; that defendant has possession of the Packard automobile; that plaintiff has been employed during her married life and has contributed to the purchase of the aforementioned realty.

"The court further finds that plaintiff is now employed and is selfsupporting.

"The court further finds that the parties hereto have entered into a settlement of their respective property rights under the terms of which defendant will pay One Thousand (\$1,000.00) Dollars to plaintiff for her interest in the said realty, to be paid \$300.00 cash and Fifty (\$50.00) Dollars per month in fourteen (14) consecutive monthly installments; that the realty at 7530 Kedvale, Skokie, Illinois, will be awarded to defendant, subject to all liens and encumbrances, plaintiff to execute quit claim deed to defendant of her interest in said realty, and defendant to indemnify plaintiff against any claims or demands on mortgage, notes, or other documents executed by her on said realty, or other indebtedness incurred by the parties hereto on said realty; that the household furniture formerly used by the parties hereto will be awarded to plaintiff; and that the plaintiff will waive all claims against defendant for alimony, attorney's fees and court costs.

"The court further finds that the said agreement is fair and reasonable and the court approves of the terms of said agreement.

"On motion of said attorney for plaintiff, it is therefore Ordered, Adjudged and Decreed, and this court by virtue of the power and authority therein vested, and the Statute in such case made and provided, doth Order, Adjudge and Decree, that the bonds of matrimony heretofore existing between the plaintiff, Dorothy E. Thorne, and the defendant, Solve E. Thorne, be, and the same are hereby dissolved, and the same are dissolved accordingly.

"It is further Ordered, Adjudged and Decreed that defendant

mortgage executed by the parties hereto; that plaintiff has possession of the household furniture formerly used by the parties hereto; that defendant has possession of the Packard automobile; that plaintiff has been employed during her married life and has contributed to the purchase of the aforementioned realty.

"The court further finds that plaintiff is now employed and is self-supporting.

"The court further finds that the parties hereto have entered into a settlement of their respective property rights under the terms of which defendant will pay one thousand (\$1,000.00) Dollars to plaintiff for her interest in the said realty, to be paid \$300.00 cash and fifty (\$50.00) Dollars per month in fourteen (14) consecutive monthly installments; that the realty at 7330 Kedvale, Chicago, Illinois, will be awarded to defendant, subject to all liens and encumbrances, plaintiff to execute quit claim deed to defendant of her interest in said realty, and defendant to indemnify plaintiff against any claims or demands on mortgages, notes, or other documents executed by her on said realty, or other indebtedness incurred by the parties hereto on said realty; that the household furniture formerly used by the parties hereto will be awarded to plaintiff; and that the plaintiff will waive all claims against defendant for alimony, attorney's fees and court costs.

"The court further finds that the said agreement is fair and reasonable and the court approves of the terms of said agreement. On motion of said attorney for plaintiff, it is therefore

Ordered, Adjudged and Decreed, and this court by virtue of the power and authority therein vested, and the Statute in such case made and provided, both Order, Adjudge and Decree, that the bonds of matrimony heretofore existing between the plaintiff, Dorothy E. Thorne, and the defendant, Solve E. Thorne, be, and the same are hereby dissolved, and the same are dissolved accordingly, "It is further Ordered, Adjudged and Decreed that defendant

shall pay to plaintiff, for her interest in the aforementioned realty, the sum of One Thousand (\$1,000.00) Dollars, to be paid Three Hundred (\$300.00) Dollars immediately upon the entry of this decree, receipt of said \$300.00 having been acknowledged in open court, and the balance of Seven Hundred (\$700.00) Dollars to be paid in fourteen (14) monthly installments of Fifty (\$50.00) Dollars each, first payment to be due December 5th, 1941.

"It is further Ordered, Adjudged and Decreed that plaintiff be and she is hereby forever barred from asserting any claims against defendant for alimony, past present or future.

"It is further Ordered, Adjudged and Decreed, that plaintiff be and she is hereby barred from any claims against defendant for attorney's fees and court costs incurred up to the entry of this decree.

"It is further Ordered, Adjudged and Decreed that in the event plaintiff is compelled to seek the aid of this court in enforcing the terms of this decree, the court shall reserve jurisdiction for the purpose of allowing to plaintiff a reasonable sum as and for her attorney's fees, costs and suit money.

"It is further Ordered, Adjudged and Decreed, that leave be and the same hereby is given to plaintiff to resume her maiden name of Johnson.

"It is further Ordered, Adjudged and Decreed that defendant be and he hereby is awarded the realty at 7530 Kedvale, Skokie, Illinois, otherwise described as follows: [Here follows legal description of the property] subject to all liens and encumbrances, and plaintiff is Ordered to execute quit claim deed to defendant of her interest in said realty; and it is further Ordered that defendant shall indemnify plaintiff against any claims or demands on mortgage, notes, or other documents executed by her on said realty, or other indebtedness incurred by the parties hereto on said realty.

"It is further Ordered, Adjudged and Decreed that plaintiff

shall pay to plaintiff, for her interest in the aforementioned
realty, the sum of one thousand (\$1,000.00) Dollars, to be paid
Three Hundred (\$300.00) Dollars immediately upon the entry of
this decree, receipt of said \$300.00 having been acknowledged in
open court, and the balance of Seven Hundred (\$700.00) Dollars to
be paid in fourteen (14) monthly installments of Fifty (\$50.00)
Dollars each, first payment to be due December 5th, 1941.

"It is further Ordered, Adjudged and Decreed that plaintiff
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defendant for alimony, past present or future.

"It is further Ordered, Adjudged and Decreed, that plaintiff
be and she is hereby barred from any claims against defendant for
attorney's fees and court costs incurred up to the entry of this
decree.

"It is further Ordered, Adjudged and Decreed that in the
event plaintiff is compelled to seek the aid of this court in en-
forcing the terms of this decree, the court shall reserve jurisdic-
tion for the purpose of allowing to plaintiff a reasonable sum as
and for her attorney's fees, costs and suit money.

"It is further Ordered, Adjudged and Decreed, that leave be
and the same hereby is given to plaintiff to resume her maiden name
of Johnson.

"It is further Ordered, Adjudged and Decreed that defendant
be and he hereby is awarded the realty at 7330 Kedzie, Chicago,
Illinois, otherwise described as follows: [Here follow legal
description of the property] subject to all liens and encumbrances,
and plaintiff is Ordered to execute said claim deed to defendant of
her interest in said realty and it is further Ordered that defend-
ant shall indemnify plaintiff against any claims or demands on
mortgages, notes, or other documents executed by her on said realty,
or other indebtedness incurred by the parties hereto on said realty.
"It is further Ordered, Adjudged and Decreed that plaintiff

be and she hereby is awarded the household furniture formerly used by the parties hereto as husband and wife.

"It is further Ordered Adjudged and Decreed, that, other than aforementioned, all and singular the rights of each of the parties hereto arising into and against the property of the other of every kind, nature and description, real personal and mixed, wheresoever situated, both personally owned and in which each of them now has any beneficial interest or hereafter acquired by each of them, including all household goods and furnishings now in the possession of either of the parties hereto shall cease and determine from and after the entry of this decree, and that neither of the parties hereto shall hereafter have any claim of right, title or interest of any kind, in, to and against the property of the other from and after the entry of the decree, including all inchoate rights of dower, curtesy, homestead or other interest of either party in and to the property of the other arising by virtue of the marriage of the parties hereto or otherwise, and including all contractual or property rights now existing between the parties hereto, either by virtue of the marriage or by virtue of any contractual or other relationship whatsoever."

Counsel for defendant made no objection of any kind to the provisions in the decree, and it is perfectly clear from the record that defendant, at the time in question, was satisfied with the decree and the "hurry-up method" in which the cause was tried and determined. No appeal was taken from the decree.

For some reason, not disclosed by the record, defendant, sometime after the entry of the decree, became dissatisfied with it. In defendant's petition, filed January 19, 1942, and his affidavit in support of the same, he alleged that the evidence for plaintiff as to her charge of cruelty was insufficient under the law for a finding by the court that he had been guilty of extreme and repeated cruelty, and he further charged that the testimony of

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plaintiff and her witnesses as to the alleged acts of cruelty was "false and untrue." Plaintiff filed an answer to the petition, denying the charges of defendant.

Plaintiff contends that at the time of the filing of the petition to vacate the decree more than thirty days had elapsed since the entry of the decree, and, therefore, the court no longer had jurisdiction to vacate the decree. This contention is a meritorious one. It has been repeatedly held that after a term of court has expired, the court has no authority to vacate, amend or modify a decree except as to matters of form and after notice to the opposite party, and the Civil Practice Act of 1933 substitutes a thirty-day period in place of a term of court. (See Schmahl v. Aurora Nat'l Bank, 311 Ill. App. 228, 233.. Other cases to the same effect might be cited.) In an effort to evade the effect of this rule defendant alleged that the testimony of plaintiff and her witnesses as to the acts of cruelty was false and untrue. Even if the petition could be considered as a motion in the nature of a writ of error coram nobis, the allegations that the testimony as to cruelty was false and untrue would avail defendant nothing. In Conway v. Gill, 257 Ill. App. 606, we held that a writ in the nature of a writ of error coram nobis will not lie for the giving of alleged false testimony at the trial; that where a judgment has been obtained through fraud such fact constitutes a sufficient reason for vacating the judgment after the term in which it was rendered, but that "the fraud, however, must be a fraud committed by one of the parties on the court and not the perjury of a witness." (p. 612.) Defendant states in his petition and in an affidavit in support of it that he was not present at the hearing of the cause before Judge Sabbath, but he admits that Attorney Bryant represent^{ed} him in the proceeding and upon that occasion. The certificate of evidence was made a part of the decree and filed in the cause with the decree, and defendant had full opportunity to read the same. He does not

Plaintiff and her witnesses as to the alleged acts of cruelty was "false and untrue." Plaintiff filed an answer to the petition, denying the charges of defendant.

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state when he first saw the certificate nor does he allege that he did not know that the decree was entered on November 6, 1941. No charge is made that Attorney Bryant failed to protect defendant's rights in the cause. Even if we had the right to consider point one, we would hold that there is no merit in it.

As to point two: This would appear to be an afterthought, as the point was not made in the petition. However, in the proceedings before the chancellor it clearly appeared that a settlement had been made between the parties as to alimony, attorney's fees and property rights, and the decree specifically finds that the parties entered into a settlement of their respective property rights, and the provisions in the decree respecting said rights are all in accordance with the agreement that plaintiff testified had been made. The trial court had a right to assume from the testimony given as to the agreement and the attitude of defendant's attorney in respect thereto that the parties had agreed upon their respective property rights, and the decree entered in regard thereto was, therefore, a decree by consent. (See Consaer v. Wisniewski, 293 Ill. App. 529.) As stated in that case (p. 532): " * * * where an attorney is the counsel of record for a client, his agreement in the conduct and management of the litigation must be considered as the agreement of his client, and if any of his acts are without sufficient authority as between him and his client the remedy of the client is against the counsel." We must not be understood, however, as intimating that we think there is the slightest ground for complaint by defendant against Attorney Bryant. Mr. Bryant, heard, without comment, the testimony in respect to the property agreement and made no statement to the court in reference to the same. If there had been no such agreement made between the parties it would have been the duty of Mr. Bryant to so inform the court. The trial court had a right to assume from Mr. Bryant's silence that the testimony in respect to the property agreement was true.

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(See Joslyn v. Joslyn, 315 Ill. App. 160.) Furthermore, Mr. Bryant made no objection to any of the provisions in the decree. The defendant, in his petition, did not deny that he paid the \$300, the receipt of which was acknowledged by plaintiff in open court. It is significant that Mr. Bryant has taken no part in this appeal.

The decretal order of the Superior court of Cook county of January 19, 1942, is affirmed.

DECRETAL ORDER OF JANUARY
19, 1942, AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

316 I.A. 45

October Term, A. D. 1942

JAMES T. WALKER,

Plaintiff-Appellee,

vs.

GUY A. THOMPSON, Trustee,
Missouri Pacific Railroad
Company, a Corporation,

Defendant-Appellant

Appeal from the

City Court of the

City of East St.

Louis, Illinois.

STONE, J.

Plaintiff-appellee brought this action for damages under the Federal Employers' Liability Act against the defendant-appellant, in the City Court of East St. Louis, Illinois. His complaint alleged damages for personal injuries sustained at Poplar Bluffs, Missouri. An issue was joined on the complaint and answer. A trial was had and plaintiff was awarded damages in the sum of \$20,000.

Defendant-appellant appealed from said judgment to this court, filing its record on such appeal on the 17th day of July, 1941, and was given leave by rule of this court to file its abstract and so forth by October 8th, 1941. On September 24, 1941, said defendant-appellant filed herein its motion to transfer said cause to the Supreme Court of the State of Illinois, alleging among other things that, as appears by the record in this case, this is a civil case at law and did not arise within the territorial limits of the City of East St. Louis, Illinois, but instead at Poplar Bluff, Missouri, and consequently the City Court of the City of East St. Louis, was wholly without jurisdiction of the subject matter of said cause for the reason that the City Court of the City of East St. Louis has not had jurisdiction of the

subject matter of the litigation conferred upon it, either by the Constitution of the State of Illinois or by statute, where the said subject matter (i. e. happening of the tort) occurred outside of the territorial limits of said City; that if the statute of the State of Illinois ("An Act in Relation to Courts of Record in Cities," approved May 10, 1901, in force July 1, 1901, as amended - Illinois Revised Statutes 1939, Chapter 37, paragraphs 333 to 355 (a) inclusive), which confers jurisdiction to City Courts be construed to confer such jurisdiction of the subject matter of litigation where the cause of action did not arise in the territorial limits of the city, then such statute is unconstitutional and void.

That there is now pending in the Supreme Court of Illinois the case of Paul W. Werner v. Illinois Central Railroad Company, being numbered 26,293 - September Term, A. D. 1941. That said cause has heretofore been determined by this Court (309 Ill. App. 292), and petition for leave to appeal has been allowed by the Supreme Court of Illinois; that after petition for leave to appeal was allowed, the Supreme Court of Illinois did enter an order permitting the filing of an additional brief and assignment of errors covering the contention that the City Court of the City of East St. Louis was wholly without jurisdiction to try said controversy because the subject matter of the litigation occurred outside of the territorial limits of the City of East St. Louis, inasmuch as the injury which was the subject matter of the litigation occurred in Pana, Illinois. That a decision in said Werner case on the merits of said contention would be conclusive in this cause.

This motion was taken under advisement by the Court and the time for filing of the necessary briefs, records and so forth, for appeal to this Court, was extended from time to time awaiting the decision of Werner v. the Illinois Central, supra, by the



state Supreme Court.

Said case of *Werner v. the Illinois Central*, supra, having in the meantime been decided by the Supreme Court (*Werner v. Illinois Central Railroad Co.* 379 Ill. 559), said defendant-appellant on July 7, 1942, filed in this court its motion for leave to withdraw motion to transfer said cause to the Supreme Court. An extensive statement of the cause of action, pleadings, suggestions, argument and so forth, is set out in said motion for leave to withdraw the former motion.

On September 10, 1942, plaintiff-appellee filed in this court by leave hereof, his motion to deny the motion of defendant-appellant for leave to withdraw its motion to transfer the cause, and further moves the court to transfer said cause to the Supreme Court.

It is held in *People v. O'Connor*, 378, Ill. 249, and *Chicago Title & Trust Co. v. Village of Westchester*, 310 Ill. App. 498, that under a motion to transfer a cause from an appellate court to the Supreme Court, under the provisions of Rule 47, Chap. 110, P. 259.47, Illinois Revised Statutes, 1941, on the ground that a litigant has raised a constitutional question, it is the duty of the Appellate Court conscientiously to determine whether such purported question is fairly involved, and whether the Supreme Court has settled such question. The Supreme Court has at least settled the question that at the time this appeal was filed in the Appellate Court there was a constitutional question involved, to wit, the jurisdiction of the City Court of East St. Louis to try issues resting on causes of action occurring extra-territorially (*Werner v. Illinois Central Railroad*, supra.). That question is no longer debatable. Appellant now takes the position that the constitutional question decided in *Werner v. Illinois Central Railroad*, supra, is decisive of all constitutional questions raised by the record before us. This may or may not be so. We cannot prejudice

what other questions will be raised in the Supreme Court going to the question of the trial court's jurisdiction, and the denial of such jurisdiction. Neither can we foreclose plaintiff-appellee from further argument on this subject. We do not understand that to be the purport of *Werner v. Illinois Central Railroad*, supra.

As we view this record it is of little or no consequence whether we deny or allow defendant-appellant's motion to withdraw his original motion to transfer the cause. With or without such a motion, if it is plain to us that a constitutional question is involved in the litigation, it is our duty to transfer it to the Supreme Court. Whether we do it on motion of a party litigant, or whether we do it of the court's own motion is of no consequence.

We are not prepared to say that *Werner v. Illinois Central Railroad*, supra, decides all constitutional questions involved, or whether the litigants in this case purpose to show to the court other reasons which render it constitutional for the trial court to take jurisdiction of the case at bar.

It follows that we are of the opinion that this motion to withdraw the original motion to transfer the cause should be denied, and that this cause should be, and it is hereby transferred to the Supreme Court of the State of Illinois, as prescribed by the Statute in such cases made and provided.

CAUSE TRANSFERRED.

FILED

NOV 19 1942

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

42216

31 C.I.A. 452¹

JOSEPH LANCY,
Appellee,

v.

JAMES ROSENBERG,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY,

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Lancy sued Rosenberg in tort for assault and battery. The cause was tried by jury. At the close of all the evidence defendant moved for an instruction in his favor, which was denied. The jury returned a verdict for plaintiff with damages assessed at \$10,000. Defendant made a motion for judgment notwithstanding the verdict, which was denied, and a motion for a new trial, which was also denied upon plaintiff entering a remittitur of \$3,000. The court entered judgment for plaintiff in the sum of \$7,000, and defendant appeals.

It is contended for reversal the judgment is manifestly against the evidence; the verdict the result of passion and prejudice caused by the hostile attitude of the trial court; the amount of the verdict excessive, and that the court erred in instructions to the jury and in rulings on the evidence.

Defendant was a dealer in second-hand automobiles, his place of business at 2525 South State Street in Chicago, where he had a used car lot. Plaintiff Lancy, with his partner, Michael Rizzo, was in the business of raising chickens at 5248 South New England Avenue. About December 17, 1938, he purchased from defendant a 1931 Cadillac car at the price of \$75.00. He had a 1931 Auburn which he traded in and for which he was allowed \$15. The balance of the purchase price was to be paid at the rate of \$7.00 every two weeks and the payments were financed by the Universal Mortgage Corporation. Plaintiff for one reason or another

3161A.452

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Appellee,

v.

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SUPERIOR COURT,

COOK COUNTY,

MR. PRESIDING JUDGE MAURICE D. LIVINGSTON, CLERK OF THE COURT.

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Defendant was a dealer in second-hand automobiles, his place of business at 2825 South State Street in Chicago, where he had a used car lot. Plaintiff Lancy, with his partner, Michael Rizzo, was in the business of raising chickens at 5245 South New England Avenue. About December 17, 1936, he purchased from defendant a 1931 Cadillac car at the price of \$75.00. He had a 1931 Auburn which he traded in and for which he was allowed \$15. The balance of the purchase price was to be paid at the rate of \$7.00 every two weeks and the payments were financed by the Universal Mortgage Corporation. Plaintiff for one reason or another

2.

was dissatisfied with the Cadillac and on March 18, 1939, took it back (defendant says) with the fenders bent in and the tires blown out, a condition it was not in when sold to plaintiff. The parties agreed that the Cadillac would be exchanged for a 1930 LaSalle, the exchange to be even, There is conflict in the evidence as to whether the license plates were furnished by defendant with the automobiles. At any rate, shortly thereafter the plaintiff (while driving the 1930 LaSalle) was arrested on a charge of operating a motor vehicle with license plates belonging to another automobile. The cause was tried before Judge Schiller on April 11, 1939. Lancy was found guilty and fined \$25 and costs. Apparently the defendant Rosenberg knew of the trial and took an interest in it. Plaintiff testifies that defendant suggested to him that he could escape conviction by testifying that the plates were not on the car when defendant delivered it to him. Plaintiff also says that defendant suggested to him that the matter could be fixed up through a court bailiff whom he knew, if plaintiff would so testify. He says he refused to do this. This is denied by defendant.

After that trial plaintiff and his partner, Rizzo, drove to defendant's place of business with a truck, which they parked there. Defendant then drove plaintiff and Rizzo in defendant's car to the Universal Mortgage Company, where the LaSalle had been financed. The mortgage company gave plaintiff a check for \$36.00 covering \$21.00 in payments which plaintiff had made to the finance company and the \$15.00 down payment made at the time the Cadillac was purchased. The LaSalle automobile was, in fact, a stolen car. Plaintiff at the office of the finance company signed a full satisfaction and complete release for all claims against the Universal Mortgage Company and the Rosenberg Motor Sales, covering the deposit and payments made on the LaSalle sedan. Rizzo, plaintiff and defendant then rode back to defendant's place of business, where the

was disassociated with the Cadillac and on March 18, 1935, took it back (defendant says) with the fenders bent in and the tires blown out, a condition it was not in when sold to plaintiff. The parties agreed that the Cadillac would be exchanged for a 1930 LaSalle, the exchange to be even. There is conflict in the evidence as to whether the license plates were furnished by defendant with the automobile. At any rate, shortly thereafter the plaintiff (while driving the 1930 LaSalle) was arrested on a charge of operating a motor vehicle with license plates belonging to another automobile. The case was tried before Judge Schiller on April 11, 1935. Nancy was found guilty and fined \$25 and costs. Apparently the defendant Rosenberg knew of the trial and took an interest in it. Plaintiff testifies that defendant suggested to him that he could escape conviction by testifying that the plates were not on the car when defendant delivered it to him. Plaintiff also says that defendant suggested to him that the matter could be fixed up through a court bailiff whom he knew, if plaintiff would so testify. He says he refused to do this. He is denied by defendant.

After the trial plaintiff and his partner, Nixon, drove to defendant's place of business with a truck, which they parked there. Defendant then drove plaintiff and Nixon in defendant's car to the Universal Mortgage Company, where the LaSalle had been financed. The mortgage company gave plaintiff a check for \$21.00 covering \$21.00 in payments which plaintiff had made to the finance company and the \$15.00 down payment made at the time the LaSalle was purchased. The LaSalle automobile was, in fact, a stolen car. Plaintiff at the office of the finance company signed a full affidavit and complete release for all claims against the Universal Mortgage Company and the Rosenberg Motor Sales, covering the deposit and payments made on the LaSalle sedan. Nixon, plaintiff and defendant then rode back to defendant's place of business, where

3.

the alleged assault took place.

The plaintiff testified he had paid the sum of \$15.00 for repairs to the LaSalle car, which he asked Rosenberg to repay; that Rosenberg refused to pay it and called plaintiff a vile name, which plaintiff returned in kind, whereupon defendant pulled out a gun he had in his pocket, fired a shot at plaintiff and chased him around the lot. In fact, he says that it was the third shot fired by defendant that struck plaintiff, severely injuring him. Plaintiff was taken to Mercy Hospital, where he remained three weeks, and an operation was performed to remove the bullet. His doctor bill was \$115.00, his hospital bill \$111.75.

The defendant's testimony is to the effect that plaintiff demanded that he pay the amount of the fine and court costs that had been assessed against him; that defendant refused to do so; that plaintiff then called him vile names, opened a knife used by him in the chicken business and chased the defendant around the lot; that defendant then ran to the office to call the police; that plaintiff tried to force his way into the office; that defendant then ran to the drawer and got his gun and fired three shots, the first into the ground, the second into the air, and the third directly at plaintiff. In short, the defense interposed is that at the time defendant shot plaintiff he reasonably feared for his life because of the attack made on him by plaintiff with the knife.

Plaintiff admits that he had in his back pocket a knife which he used for dressing chickens, but he says he did not produce any knife before defendant fired the first or second shots. He admits he produced it before defendant fired the third shot. Plaintiff also says that the knife was never open; that defendant was about 35 feet away from him when he fired the third shot; that his friend, Rizzo, called the police; that the police put plaintiff in the car and sent him to Mercy Hospital.

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at the time defendant shot plaintiff he reasonably feared for his

life because of the attack made on him by plaintiff with the knife.

Plaintiff admits that he had in his back pocket a knife which

he used for dressing chickens, but he says he did not produce any

knife before defendant fired the first or second shot. He admits

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also says that the knife was never open; that defendant was about

35 feet away from him when he fired the third shot; that his friend,

Rizzo, called the police; that the police put plaintiff in the car

and sent him to Mercy Hospital.

4.

The defendant contends in the first place that the verdict is manifestly against the evidence. Defendant admits that he shot plaintiff. The witnesses who saw the occurrence and testified about it were plaintiff and defendant, plaintiff's partner Rizzo, and defendant's brother Solomon. Defendant and his brother testify that at the time of the shooting plaintiff was about to attack defendant with the knife. Plaintiff denies this and his testimony is corroborated by that of his partner Rizzo. There was a fifth witness, an employee of the defendant, who was present at the time of the shooting. He was not produced as a witness. Defendant testified that he looked for him but was not able to find him. Defendant says he shot the plaintiff because he feared for his life. As a matter of fact, his plea is self-defense, and the shooting being admitted it was for the defendant (as the court instructed the jury) to prove this defense by a preponderance of the evidence.

Harvey v. Aubrey, 53 Ariz. 210, 87 Pac.Rep. 482; New York Life Ins. Co v. Rogers, 126 Fed. (2nd) 784.

In view of the circumstances recited, apparently this court may not hold the verdict to be contrary to the manifest weight of the evidence. The jury and the trial judge saw and heard the witnesses and had every opportunity to determine the facts. The jury not only found defendant guilty of the assault but also, in reply to a special interrogatory, said it was wilful, wanton and malicious. Reading the whole record we are inclined to the view that the jury was well warranted in returning the verdict. At any rate, we would not be justified in overruling that verdict after it was approved by the trial judge.

It is urged that the verdict was the result of prejudice and passion on the part of the jury and that much of the evidence had no bearing on the issue of whether the defendant assaulted the plaintiff. The evidence concerned a long chain of circumstances beginning with the purchase of the Cadillac automobile. The greater part of this evidence, however, went in without objection, and we

The defendant contends in the first place that the verdict

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that at the time of the shooting plaintiff was about to attack defendant with the knife. Plaintiff denies this and his testimony is corroborated by that of his partner Hines. There was a fifth

witness, an employee of the defendant, who was present at the time

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As a matter of fact, his plea is self-defense, and the shooting

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to a special interrogatory, said it was willful, intentional and malicious.

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5.

do not regard it as wholly immaterial. On the contrary, we think it was admissible as tending to show the whole situation. It was undisputed that defendant sold plaintiff a stolen car and that the controversy between them arose over a dispute arising out of that fact. Counsel for plaintiff in his closing argument referred to the fact that defendant dealt in stolen cars. Defendant objected but the court overruled, saying, "The jury will consider whether or not the statement is true". We think there was no reversible error in this respect. That the car was stolen was an admitted fact in the case. It is probably true that the evidence as to defendant's dealings with plaintiff did not tend to impress the jury in his favor, but the evidence was material and the jury was entitled to know the facts. The case was tried with some heat, all of which was not on one side. In view of the special finding the jury had a right to impose punitive damages, and we are inclined to ^{not} the view that it was/only their right but their duty to do so,

For this and other reasons the further contention of the defendant that the judgment is excessive cannot be sustained. Dr. Sawyer, the surgeon who attended plaintiff for his injuries, testified and his evidence is not contradicted. He said the bullet entered the left chest of plaintiff just slightly to the left of the sternum, or breast bone, between the first and second or second and third ribs; that it went through plaintiff's chest and lodged about opposite the fourth dorsal vertebrae; the patient expectorated blood and for ten days was treated with the view of avoiding an abscess of the lungs; his pulse ran up to 120; he received the usual treatment, including the administration of anti-tetanus serum; the bullet was removed by the surgeon after a week or ten days, it having been previously located by X-ray at the point named. The plaintiff was in the hospital for two weeks and was under medical care for a long time thereafter. At the time of the

do not regard it as wholly immaterial. In the contrary, we think it was equally as tending to show the whole situation. It was undisputed that defendant told plaintiff a stolen car and that the controversy between them arose over a dispute arising out of that fact. Counsel for plaintiff in his closing argument referred to the fact that defendant dealt in stolen cars. Defendant objected but the court overruled, saying, "The jury will consider whether or not the statement is true". We think there was no reversible error in this respect. That the car was stolen was an admitted fact in the case. It is probably true that the evidence as to defendant's dealings with plaintiff did not tend to impress the jury in his favor, but the evidence was immaterial and the jury was entitled to know the facts. The case was tried with some heat, all of which was not on one side. In view of the special finding the jury had a right to impose punitive damages, and we are inclined to the view that it was ^{not} only their right but their duty to do so.

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last examination - more than 2 1/2 years after the assault (a little more than a month before the trial) there was no evidence of acute infection in the chest and the temperature was normal, but Dr. Sawyer says, "There was a certain amount of permanent infiltration of the upper/^{left} lobe of the lung". He was asked by the court what he meant by this and replied, "With a gunshot wound there is always a certain amount of infiltration or germs and the germs that were in the upper lobe of the lung produced a certain effect on the adjoining tissues, and we may call that infiltration. As that infection subsided and when the healing takes place it results in the formation of scar tissue, the same as it does when you have a wound outside. The scar tissue in his lung naturally occupies a certain part of his lung tissue and to that extent interferes with the function of that lobe of his lung". Asked for his opinion the doctor stated that there was a certain degree of permanent disability; that the lung tissue when destroyed would never be replaced. Plaintiff testifies he had been earning \$35.00 a week from his business, and that by this assault he was rendered incapable of doing his work.

The court required a remittitur of \$3,000 from the verdict of the jury, and we think the judgment of \$7,000 is not excessive under all circumstances, especially in view of the finding that the assault was wilful and malicious,

It is urged that the court at the trial assumed the dual role of trial judge and counsel for plaintiff, We have carefully examined the record and think this statement is wholly unjustified. On the contrary, we think the trial was conducted under sometimes difficult circumstances with fairness.

It is urged that the court erred in instructing the jury and in particular in omitting to instruct that the burden of proof was upon the plaintiff in the case. As a matter of fact, the

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shooting was admitted and the burden of proof was upon the defendant to establish justification. Plaintiff's brief says that the instructions were given by agreement. The record does not bear out this statement. Upon the whole record we are satisfied substantial justice has been done, and the judgment will be affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

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defendant to establish justification. Plaintiff's brief says that
the instructions were given by agreement. The record does
not bear out this statement. Upon the whole record we are
satisfied substantial justice has been done, and the judgment
will be affirmed.

AFFIRMED.

McGuire and O'Connor, JJ., concur.

42128

ANNA DELACH,
Appellant,

vs.

GEORGE A. SCHUBERTH,
Appellee.

316 I.A. 452²

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover damages for personal injuries caused, as she claims, by the negligent handling by defendant of his automobile. The jury returned a verdict for the defendant and plaintiff appeals.

The accident occurred about 10 o'clock in the evening of April 7, 1939 on Harlem avenue, which is a four-lane highway, extending north and south; plaintiff's house is located on the east side of Harlem avenue opposite 58th place, which extends west but not east of Harlem; a driveway 8 feet wide runs east from Harlem along the north side of plaintiff's house.

Plaintiff was riding as a passenger in a truck driven north in Harlem by her husband; they were returning homeward after attending a church service; the truck stopped in the inner lane at Harlem a few feet south of the driveway. The testimony tended to show that one intending to go into the driveway with a truck must start from the inner lane, as the driveway is too narrow to permit the truck to be driven into it from the outer lane. While standing there Mr. Delach, plaintiff's husband, observed two automobiles about 200 feet behind the truck coming north on Harlem in the outer lane; he remained standing there to permit these autos to pass before making the right turn into the driveway. Mr. Delach testified that at this time there was a 3-inch tail light burning at the rear of the truck, also a white light on the back of the cab, and the two

ANNA DELACH,
Appellant,
vs.
GEORGE A. SCHUBERT,
Appellee.

APPEAL FROM
SUPERIOR COURT,
SIOUX COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover damages for personal injuries caused, as she claims, by the negligent handling by defendant of his automobile. The jury returned a verdict for the defendant and plaintiff appeals.

The accident occurred about 10 o'clock in the evening of April 7, 1939 on Harlem avenue, which is a four-lane highway, extending north and south; plaintiff's house is located on the east side of Harlem avenue opposite 58th place, which extends west but not east of Harlem; a driveway 8 feet wide runs east from Harlem along the north side of plaintiff's house.

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headlights were lighted.

The most southerly of the two autos traveling in the outer lane was occupied by two police officers. Both of them testified that they saw the tail light burning on the truck as they approached and passed it. Mr. Delach testified that after these two cars had passed he was about to turn into the driveway when he noticed another car coming north in the inner lane about 150 feet to the rear; that he waited for this car to pass. This car was driven by the defendant, and it ran into the back end of the truck, knocking it to the north 20 to 40 feet. Anna Delach, plaintiff, was injured in the collision and after a few days' stay at home was taken to a hospital where she remained for treatment.

Plaintiff introduced a number of witnesses who testified that the street was dry and the weather clear, and that the tail light on the back of the truck was burning. Defendant and his wife, who was riding with him, claimed it was snowing, that visibility was poor and that there was no tail light on the back of the truck; that a car was preceding defendant's car, going northward in the inner lane, and when it got close to the truck it turned into the outer lane, passing the truck; that when defendant first saw the truck he was about 25 feet away; that he attempted to pass it to the left and his right front fender struck the truck. Defendant testified that the truck did not move at all when he struck it and that no damage was done to it in the accident.

There was conflicting evidence on important points in the case. The presence, or otherwise, of a burning tail light on the truck was in sharp dispute - the greater number of witnesses testifying that it was burning. However, as there must be another trial, we do not comment on the variant stories or the weight of the testimony. It was a case where the rulings on evidence

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and comments by the trial court would have a very potent influence on the conclusion of the jury.

Plaintiff argues that the trial court committed error in ruling on objections, in cross-examination of plaintiff's witnesses and in remarks and comments on the evidence. Without going into details, the record justifies this criticism. By way of illustration, the court sustained all objections by defendant's counsel to questions put to a witness for the purpose of showing that it was impracticable to turn a vehicle of the size of this truck from Harlem avenue into the driveway alongside plaintiff's house, except from the inner lane. All such testimony was proper as tending to explain why plaintiff had stopped his truck on the inner lane and was waiting there for north bound traffic to pass before starting into the driveway. There were frequent comments by counsel for the defendant in the presence of the jury which should not have been permitted. A typical instance was where counsel remarked, after counsel for plaintiff had questioned a witness: "Obviously the answer doesn't suit him, your honor." Also his remark, as to another witness, after he had cross-examined her, that he did not think the witness was feeling very well. Other similar remarks should not have been permitted, as they tended to produce prejudice against plaintiff in the minds of the jurors.

At the request of the defendant the court gave seven instructions which directed a verdict of not guilty. The giving of a large number of such instructions has been held to be reversible error in many cases. Repeatedly telling the jury to find the defendant not guilty has been held to have a tendency to mislead. Pillow v. Long, 299 Ill. App. 542, 545; Williams v. Stearns, 256 Ill. App. 425, 434. In Nelson v. Chicago City Ry. Co., 163 Ill. App. 98, it was held that the character and number of the repetitions of the same idea would be "well calculated to impress the jury with the thought that the court was against the plaintiff on the question of fact and that they might readily be misled to

and comments by the trial court would have a very potent influence on the conclusion of the jury.

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on the question of fact and that they might readily be misled by

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believe that in the opinion of the court they should find for the defendant. No legitimate reason appears for the repetition of the direction to find the defendant 'not guilty' so frequently."

We are of the opinion that instruction No. 22, given at the request of defendant, should not have been given. This contains the provisions of the state statute touching signals to be given by the operator of a vehicle to one "immediately to the rear." Mr. Delach did not make such a signal, for when he stopped his truck defendant's car was not "immediately to the rear." There should be no point in making the signal of a right hand turn until the other north bound traffic had passed. There was no basis in the evidence for this instruction and it was error to give it, especially as it ordered a finding for the defendant.

It was not necessary to give so many instructions - 14 for plaintiff and 18 for the defendant. The case presented only a question of fact. The giving of so many instructions only tends to confuse the jury.

Plaintiff's brief says that the court erred in refusing to submit to the jury as a question of fact the wilful and wanton conduct of the defendant. The record, however, shows that the count containing this charge was dismissed on motion of the plaintiff. She therefore cannot complain of this action by the court.

For the reasons above indicated we hold that the judgment should be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

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Plaintiff's brief says that the court erred in refusing to submit to the jury as a question of fact the willful and wanton conduct of the defendant. The record, however, shows that the court containing this charge was dismissed on motion of the plaintiff. She therefore cannot complain of this action by the court.

For the reasons above indicated we hold that the judgment should be reversed and the cause remanded for another trial.

REVEREND AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

FRED HOVER, doing business as
Fred Hover Company,
Appellant and Cross-Appellee,

vs.

COLONIAL PREMIER COMPANY, a
corporation,
Appellee and Cross-Appellant.

APPEAL FROM

MUNICIPAL COURT OF
CHICAGO.

310 I.A. 453

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a balance due for the building and installation of what is called a "pass oven" for defendant. Defendant alleged a breach by plaintiff of the warranties accompanying the contract for this and presented a counterclaim for damages said to have been sustained by it on account of such breach. Upon trial the court without a jury found there was a balance due plaintiff of \$903.50. There is no dispute as to this. Defendant was allowed on its counterclaim \$4,329.59. The amount due plaintiff on the contract price was deducted from this and judgment was entered in favor of the defendant for the difference, \$3,426.09.

Plaintiff appeals from this judgment against it and defendant filed a cross-appeal asserting that the judgment in its favor was too small. The court allowed defendant judgment for damages sustained up to September 15, 1940, and defendant argues that it should also have been allowed the damages suffered between that date and October 19, 1940, amounting to \$1,867.55.

Defendant for many years has been a manufacturer of table and floor lamps with metal bases and fittings, which before 1940 had been covered with a lacquer which was air-dried. Early in 1940 Mr. Chanock, defendant's president, learned of an enamel finish called "polymerine," which was new to him; this is a synthetic enamel made by a manufacturer, Ault & Wiborg which licenses the

THE NEW YORK, N. Y. DISTRICT COURT,
 In and for the Southern District of New York,
 Appellate and Cross-Appellate,
 vs.

COLONIAL TRADING COMPANY, INC.,
 Appellate and Cross-Appellate.

MR. JUSTICE GEORGE D. LIVINGSTON, JR., in Court.

Plaintiff brought suit to recover a balance due for the

building and installation of what is called a "gas oven" for

defendant. Defendant alleged a breach by plaintiff of the

warranties accompanying the contract for this and presented a

counter-claim for damages said to have been sustained by it on

account of such breach. Upon trial the court without a jury found

there was a balance due plaintiff of \$603.80. There is no dispute

as to this. Defendant was allowed on its counter-claim \$4,324.07.

The amount due plaintiff on the contract price was reduced from

this and judgment was entered in favor of the defendant for the

difference, \$3,428.09.

Plaintiff appeals from this judgment against it and defendant

filed a cross-appel asserting that the judgment in its favor was

too small. The court allowed defendant judgment for damages

sustained up to September 18, 1940, and defendant argues that it

should also have been allowed the damages sustained between that date

and October 12, 1940, according to \$1,537.33.

Defendant for many years has been a manufacturer of stoves

and floor lamps with metal bases and fittings, which before 1940

had been covered with a lacquer which was fire-resistant, but in 1940

Mr. Charnock, defendant's president, learned of an enamel finish

called "polymerize," which was new to him; and as a synthetic

enamel made by a manufacturer, and in which license was

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use of it only to those who have proper facilities for hardening it by the application of heat. The enamel is more durable than a lacquer finish. The use of an enamel finish was new to those employed in defendant's plant and none of them had had any experience in baking enamels or the use of ovens for this purpose.

In March 1940 defendant obtained a license to use polymerine upon condition that defendant obtain facilities adequate to bake this enamel on the products. Chanock was told that it was essential that the enamel coating be baked in an even temperature of 300 degrees for the minimum period of ten minutes and that this required a special oven, and plaintiff was recommended to defendant as a builder of such ovens.

Plaintiff was in the business of designing and building ovens and had been in this business since 1919; on its letterhead were the words - "Industrial ovens a specialty, for enameling, drying." The parties met in the early part of 1940 and Chanock stated to plaintiff his desire to use the polymerine for enameling, and under the license he could use it only on a pass oven, which would adequately and properly bake the enamel; that he knew nothing about this type of oven and would have to depend upon plaintiff to manufacture and install a properly designed oven; that one of the requisites was that it must maintain a temperature of 300 degrees for at least ten minutes. Plaintiff told Chanock that he knew all about the polymerine type of enamel and could make an oven that would meet all of the requirements and that defendant could rest assured that he would give a satisfactory job for baking polymerine. This conversation was corroborated by J. H. Letchinger, defendant's plant superintendent. There is no denial that this conversation took place.

After some further discussion a written contract was entered into whereby defendant agreed to pay \$2,403.50 for the building and

use of it only to those who have proper facilities for handling it by the application of heat. The enamel is very durable and is never finished. The use of enamel finish was new to those employed in defendant's plant and none of them had any knowledge in baking enamel or the use of ovens for this purpose.

In March 1940 defendant obtained a license to use polyethylene upon condition that defendant obtain facilities necessary to make this enamel on the products. Gracoer was told that it was essential that the enamel coating be baked in an oven capable of 350 degrees for the minimum period of ten minutes and that this required a special oven, and plaintiff was recommended to defendant as a builder of such ovens.

Plaintiff was in the business of designing and building ovens and had been in this business since 1912; on the 12th of 5 was the words - "Industrial ovens a specialty, for annealing, drying." The parties met in the early part of 1940 and Gracoer at that time plaintiff his desire to use the polyethylene for enameling, and under the license he could use it only on a bare oven, which would adequately and properly bake the enamel; that he knew nothing about this type of oven and would have to depend upon plaintiff to manufacture and install a properly designed oven; that one of the requirements was that it must maintain a temperature of 350 degrees for at least ten minutes. Plaintiff told Gracoer that he had built about the polymarine type of enamel and could meet on even that would meet all of the requirements and that defendant could rest assured that he would give a satisfactory job for baking polyethylene. This conversation was corroborated by J. E. Stettin, defendant's plant superintendent. There is no denial that this conversation took place.

After some further discussion a written contract was entered into whereby defendant agreed to pay \$2,400.00 for the building and

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installation of the oven. This was installed and operation commenced in June 1940. There was convincing evidence that the operation was not satisfactory in that it failed to maintain throughout the oven a uniform heat of 300 degrees for ten minutes. When the required heat was less than ten minutes the enamel became soft and was easily dented, and if the heat went above 300 degrees it became brittle and blistered. Plaintiff inspected the oven from day to day and undertook to make changes and adjustments, assuring the defendant that these would cause the oven to work satisfactorily.

There is a large amount of evidence to the effect that plaintiff and his son, Hover, Jr., and other workmen of plaintiff examined the oven and attempted by various adjustments to make it meet the requirements but the oven never attained uniformity of 300 degrees of heat for a period of ten minutes throughout the oven. Apparently the trouble was that at the open ends of the oven, which was about 20 feet long, the enamel was not properly baked on account of the cold air coming in through these ends; that when the increased heat was applied to overcome this the enamel on the lamps not so exposed to the cold air were overheated and became brittle.

A number of what are called Bristol charts and tests were made which it is said accurately record the exact temperature at every minute of the time of the journey of the lamps on an endless conveyor through the oven. These tests, according to the testimony of Chanock, Letchinger and a Mr. Heath, representing the manufacturers of the process, showed a failure of the oven to maintain the required degree of heat for the required time. One witness testified that about one-third of the parts put through the oven failed to be baked so as to be commercially salable.

Plaintiff suggested that W. E. Smith, an expert, be called in to examine the oven to ascertain the trouble. Smith had ten years of experience in applying various types of enamel and he

installation of the oven. This was testified by operation commenced in June 1940. There was no convincing evidence that the operation was not satisfactory in that it failed to maintain throughout the oven a uniform heat of 300 degrees for ten minutes. When the required heat was less than ten minutes the oven became soft and was easily deformed, and if the heat went above 300 degrees it became brittle and blistered. Plaintiff inspected the oven from day to day and had to look to make changes and adjustments, knowing the defendant that these would cause the oven to work satisfactorily.

There is a large amount of evidence to the effect that Plaintiff and his son, David, Jr., and other members of Plaintiff examined the oven and attempted by various adjustments to make it meet the requirements but the oven never attained uniformity of 300 degrees of heat for a period of ten minutes throughout the oven. Apparently the trouble was that at the open ends of the oven, which was about 10 feet long, the heat was not properly maintained on account of the cold air coming in through these ends; that when the increased heat was applied to overcome this the enamel on the lamps not so exposed to the cold air were overheated and became brittle.

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reported to plaintiff that the failure to meet the requirements was caused by the open ends of the oven which allowed the escape of heated air and the entrance of cold air. Although Smith was recommended by plaintiff as an expert in ovens, when he reported to plaintiff the cause of the failure and what could be done to remedy this, plaintiff emphatically told Smith he didn't know what he was talking about.

In September 1940 plaintiff refused to make any more attempts to improve the operation of the oven. Thereupon defendant employed another concern- Drying System, Inc., which made alterations and reconstructions. This was completed about October 19, 1940, and thereafter the required uniform temperature was maintainable and the oven worked in a satisfactory manner.

Plaintiff argues that all the agreements and warranties are contained in the written contract; that the only issue is whether the plaintiff has installed the kind of an oven described therein and that there was no express or implied warranty that the oven would perform or function in a satisfactory way. To this defendant replies that the positive assertion of a matter of fact made by a seller at the time of a sale for the purpose of assuring the buyer and inducing him to make the purchase, which assertion is relied on by the purchaser, constitutes a warranty. This is in substance the holding in MacAndrews & Forbes Co. v. Mechanical Mfg. Co., 367 Ill. 288, 297. This case further holds that the intention of the parties, read in the light of the surrounding circumstances, will aid the court in arriving at the true meaning of the contract. That opinion cites many cases to the same effect. Applying this rule to the evidence that defendant knew nothing about this enameling method and would rely upon plaintiff to install a satisfactory oven, and plaintiff's assertion that he was amply qualified by experience to do this, clearly supports the position of the defendant. Moreover, there was a definite warranty in the written contract, namely that

reported to plaintiff that the failure to start the motor was caused by the open end of the oven which allowed the escape of heated air and the entrance of cold air. Although plaintiff recommended by plaintiff as an expert in ovens, when he reported to plaintiff the cause of the failure and what could be done to remedy this, plaintiff emphatically told him that he didn't know what he was talking about.

In September 1940 plaintiff refused to make any more attempts to improve the operation of the oven. Thereupon defendant employed another concern--Drying System, Inc., which made all repairs and reconstructions. This was completed about October 15, 1940, and thereafter the repaired motor operated satisfactorily and the oven worked in a satisfactory manner.

Plaintiff argues that all the agreements and warranties are contained in the written contract; that the only issue is whether the plaintiff has installed the kind of an oven described therein and that there was no express or implied warranty that the oven would perform or function in a satisfactory way. To this defendant replies that the positive assertion of a motor at issue made by a seller at the time of sale for the purpose of assuring the buyer and inducing him to make the purchase, which assertion is relied on by the purchaser, constitutes a warranty. This is in substance the holding in McGowan v. Barker, 207 F.2d 837, 111 F.2d 838, 38-1 U.S. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

that the intention of the parties, read in the light of the surrounding circumstances, will be found in arriving at the true meaning of the contract. That which a clear, unambiguous, and definite warranty in the written contract, namely that

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"Heated air will be provided by a Hover direct type, gas-fired, recirculating air heater, and will be circulated in the oven by means of a blower and motion. Suitable duct work will be provided to insure an even distribution of heat throughout the oven." There was ample evidence that the oven did not give an even distribution of heat throughout, so that there was a failure in this respect.

It is also pointed out that the contract provided that "workmanship entering into the construction of the oven is guaranteed to be of the best quality." "Workmanship" includes the designing and arrangement of the oven for distributing and maintaining the required heat. Guarantees of good workmanship have been held to be the equivalent of a warranty of fitness for the purpose designed. Salt Lake Hardware Co. v. Connell, 47 Wyo. 145; American Spiral Pipe Works v. Universal Oil Prod. Co., 220 Ill. App. 383; Day Pulverizer Co. v. Rutledge, 238 Ky. 817; Economy Fuse & Mfg. Co. v. Raymond Concrete Pipe Co., 111 F. (2d) 875, 880. The contract also contained certain provisions for the capacity of the oven, which would necessarily refer to the number of lamp parts to be baked.

(Section 15 of the Uniform Sales Act (Ill. Rev. Stats. ch. 121 1/2 provides that "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." And sub-par. (6) provides that "An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith." We are of the opinion that the implied warranty of fitness

"Heated air will be provided by a power blower type, gas-fired, recirculating air heater, and will be circulated in the oven by means of a blower and motor. Suitable duct work will be provided to insure an even distribution of heat throughout the oven." There was ample evidence that the oven did not give an even distribution of heat throughout, so that there was a failure in this respect.

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"workmanship entering into the construction of the oven is guaranteed to be of the best quality." "workmanship" includes the designing and arrangement of the oven for distribution and maintaining the required heat. Guarantee of good workmanship have been held to be the equivalent of a warranty of fitness for the purpose designed. Walt Lake Hardware Co. v. Howell, 47 Cal. 143; American Pipe Line Corp. v. Universal Pipe Works, 130 Ill. App. 393; Ray v. Pivner, 208 Ill. App. 393; Ray v. Pivner, 208 Ill. App. 393; Ray v. Pivner, 208 Ill. App. 393. The contract also contained certain provisions for the capacity of the oven, which would necessarily refer to the number of lamp parts to be baked.

Section 15 of the Uniform Sales Act (Ill. Rev. Stat.

ch. 121 1/2 provides that "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears from the buyer's statement on the seller's skill or judgment (whether he be the producer or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." And sub-par. (2) provides that "an express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith." We are of the opinion that the implied warranty of fitness

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in this case is consistent with the express warranties stated in the contract. A buyer may rely on both kinds of warranties.

Lidgerwood Mfg. Co. v. Robinson & Son Cont'g. Co., 183 Ill. App. 431, 439-441; Lathrop-Paulson Co. v. Perkson, 229 Ill. App. 400; American Spiral Pipe Works v. Universal Oil Prod. Co., 220 Ill. App. 383; Lyon & Healy, Inc. v. Central States Hotel Co., 296 Ill. App. 345; Woolton v. Crist, Inc., 210 Ill. App. 62. 55 Corpus Juris at page 750 says: "All jurisdictions concur in holding that a manufacturer warrants the fitness of goods he manufactures for a particular purpose of which he is expressly or impliedly informed by the buyer, if the buyer relies upon the manufacturer's skill and judgment in furnishing the goods."

Plaintiff argues that polymerine was a new product and its use was experimental, and cites Frost v. Van Cleaf, 291 Ill. App. 363, where it was held that as both seller and buyer were entirely unfamiliar with the product it could not be said that the buyer was relying upon the seller's skill and judgment as to whether the material would serve the purpose.

The evidence in the present case does not support the claim that the polymerine enamel was a new product and had not been baked in an oven prior to the attempt made by the defendant. The process was new to the defendant and its officers, but the witness Smith had had ten years of experience with various types of lacquers and enamels and was familiar with the lacquer known as polymerine. William Hover, Jr., testified that polymerine was merely a trade name for a product containing synthetic resins; that there are many such products which are baked in ovens although they do not go by the name of polymerine, but all of them require the same kind of baking as polymerine - the requirements are no different.

Plaintiff says that defendant could have prevented damages by

in this case is consistent with the express warranties made in the contract. A buyer may rely on both kinds of warranties. Lidgerwood Mfg. Co. v. Robinson & Son 111. App. 431, 133 Ill. App. 431, 432-441; Lathrop-Paulson Co. v. Pearson, 130 Ill. App. 400; American Signal Pipe Works v. Universal Oil Prod. Co., 130 Ill. App. 383; Lyon & Healy, Inc. v. Continental Sales Corp., 130 Ill. App. 346; Woolton v. Grist, Inc., 130 Ill. App. 32. 33 before last at page 750 says: "All jurisdictions concur in holding that a manufacturer warrants the fitness of goods he manufactures for a particular purpose of which he is expressly or impliedly informed by the buyer, if the buyer relies upon the manufacturer's skill and judgment in furnishing the goods." Plaintiff argues that polystyrene was a new product and its use was experimental, and cites Frost v. Van Gies, 131 Ill. App. 363, where it was held that as both seller and buyer were entirely unfamiliar with the product it could not be said that the buyer was relying upon the seller's skill and judgment as to whether the material would serve the purpose. The evidence in the present case does not support the claim that the polystyrene enamel was a new product and had not been baked in an oven prior to the attempt made by the defendant. The process was new to the defendant and its officers, but the witness said that he had some years of experience with various types of lacquers and enamels and was familiar with the lacquer known as polystyrene. William Hoover Jr., testified that polystyrene was merely a trade name for a product containing synthetic resins; that there are many such products which are baked in ovens although they do not go by the name of polystyrene, but all of them require the same kind of baking as polystyrene - the requirements are no different. Plaintiff says that defendant could have prevented damage by

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the exercise of reasonable care. There is no evidence of any lack of care on the part of defendant. While it had been engaged in the manufacture of floor and table lamps for 25 years, these were finished by the application of a lacquer which was dried by subjecting it to air. When the oven installed by plaintiff failed to bake the materials properly, plaintiff was notified and the whole matter of attempting to improve the process was then under the control of plaintiff and his employees. Defendant was diligent in his attempts to improve conditions.

Section 69 of the Uniform Sales Act provides that where there is a breach of warranty by the seller the buyer may (1)-a "Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." The money expended by defendant for alterations and reconstruction of the oven by the Drying System, Inc., is not disputed. This amount was \$810.52.

Section 70 of the Sales act also permits the recovery of special damages. After the preliminary tests, which were unsatisfactory, plaintiff insisted that defendant continue to use the oven with the first changes made by plaintiff. Defendant's superintendent kept a record of the number and kind of lamp parts on which the enamel was improperly baked. There is undisputed evidence as to the work done on such parts. It required the removal of the improper finish and it was necessary to repolish and refinish them. Letchinger testified, giving in detail the number of such unfinished products and the work required to refinish them; that 20,225 metal parts were damaged by improper baking from July 1 to September 15, 1940, at a cost to defendant for refinishing them of \$3,519.07.

The court disallowed defendant's claim for damages for the period between September 15 and October 19 and gave as his reason that defendant was not entitled to damages incurred after they had contracted with the Drying System company for the rebuilding

the exercise of reasonable care. There is no evidence of any lack of care on the part of defendant. While it had been engaged in the manufacture of floor and table lamps for 25 years, these were finished by the application of a lacquer which was dried by subjecting it to air. When the oven installed by plaintiff failed to bake the materials properly, plaintiff was notified and the whole matter of attempting to improve the process was then under the control of plaintiff and his employees. Defendant was diligent in his attempts to improve conditions.

Section 69 of the Uniform Sales Act provides that where there is a breach of warranty by the seller the buyer may (1) - "Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." The money expended by defendant for alterations and reconstruction of the oven by the Tying System, Inc., is not disputed. This amount was \$10.52.

Section 70 of the Sales Act also permits the recovery of special damages. After the preliminary facts, which were undisputed, plaintiff insisted that defendant continue to use the oven with the first changes made by plaintiff. Defendant's superintendent kept a record of the number and kind of lamp parts on which the enamel was improperly baked. There is undisputed evidence as to the work done on such parts. It required the removal of the improper finish and it was necessary to repolish and refinish them. Defendant testified, giving in detail the number of even unfinished products and the work required to refinish them; that 30, 35 metal parts were damaged by improper baking from July 1 to September 13, 1940, at a cost to defendant for refitting them of \$5,519.07.

The court disallowed defendant's claim for damages for the period between September 15 and October 13 and gave as his reason that defendant was not entitled to damages incurred after they had contracted with the Tying System company for the refitting

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of the oven. The damages for this period amounted to \$1,867.55, and defendant by its cross-appeal claims this. The theory of the court seems to be that during this latter period defendant should not have attempted to bake any of its products in the oven but should have allowed it to stand idle during this time. While defendant might hope that the Drying System could put the oven in a satisfactory condition, yet the outcome was still uncertain. Plaintiff had refused to attempt to improve conditions. The defendant immediately employed the new concern, Drying System, which involved days of study, planning and designing, and several weeks in fabricating and installing the new system. The period from September 15 to the middle of October was the very height of defendant's production season in order to get its product into the stores for the Christmas season. It would seem the part of wisdom to operate the oven with the imperfect adjustments made by plaintiff. The alternative would be to suspend all production and by losing the Christmas season trade the damages to defendant and traceable to plaintiff's breach of warranty, would undoubtedly have been much larger. By continuing to operate the oven the damages for which plaintiff was liable were lessened. Under these circumstances the trial court should have included in defendant's judgment the damages suffered during this latter period.

For the reasons indicated the judgment of the trial court is reversed and judgment will be entered in this court against plaintiff and in favor of the defendant for the full amount of its damages, less \$903.50 the unpaid balance of the purchase price, or \$5,293.64, all costs of this appeal to be taxed against the plaintiff.

REVERSED AND JUDGMENT ENTERED IN
THIS COURT FOR THE DEFENDANT IN THE
AMOUNT OF \$5,293.64.

Matchett, P. J., concurs.
O'Connor, J., dissents.

of the oven. The damages for this were assessed at \$1,887.50, and defendant by its cross-examination of this. The theory is that court seems to be that during the latter period defendant would not have attempted to bake any of its products in the oven but would have allowed it to stand idle during this time. With defendant might hope that the typing system could put the oven in a satisfactory condition, yet the outcome was still use of the typing had refused to attempt to improve conditions. The defendant immediately employed the new concept, typing system, which involved days of study, planning and designing, and several weeks in fabricating and installing the new system. The period from September 15 to the middle of October was the very height of defendant's production season in order to get its product into the stores for the Christmas season. It would seem the part of wisdom to operate the oven with the imperfect adjustments made by plaintiff. The alternative would be to suspend all production and by losing the Christmas season finds the damages to defendant and plaintiff's breach of warranty, would undoubtedly have been much larger. By continuing to operate the oven the accident for which plaintiff was liable were lessened. Under these circumstances the trial court should have included in defendant's judgment the damages suffered during this latter period. For the reasons indicated the judgment of the trial court is reversed and judgment will be entered in this court as follows: Plaintiff and in favor of the defendant for the full amount of \$1,887.50 the unpaid balance of the purchase price, or \$1,887.50, all costs of this appeal to be taxed against the plaintiff.

W. J. Conners,
Plaintiff.
J. J. Conners,
Defendant.

RECEIVED AND FORWARDED TO THE
COURT OF APPEALS IN THE
STATE OF TEXAS
AT THE CITY OF DALLAS
ON THE 12TH DAY OF OCTOBER, 1934.

42201

RUSSELL S. MOORE,
Appellee,

vs,

WILLIAM L EDMONDS, LAWRENCE J.
KOLLATH, DUDLEY L. DEWEY, KELLOGG
HUNTINGTON, and ILLINOIS BRICK
COMPANY, a corporation,
Defendants

On Appeal of WILLIAM L. EDMONDS,
LAWRENCE J. KOLLATH and DUDLEY L.
DEWEY,
Appellants

31 C.I.A. 453

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the above named defendants to recover damages for injuries received on a toboggan slide operated by Edmonds, Kollath and Dewey. The cause was dismissed as to defendants Kellogg Huntington and Illinois Brick Company. The jury returned a verdict finding the remaining defendants guilty and assessing plaintiff's damages at \$12,500. These defendants appeal from the judgment.

Plaintiff introduced evidence tending to show that defendants were negligent in the operation of the toboggan slide by permitting a dangerous ditch to traverse the toboggan runway.

Defendant first says the trial court improperly permitted a disclosure to the jurors on their voir dire that a foreign insurance company had insured defendant against risks such as were involved. Before examining the prospective jurors the attorneys for plaintiff asked permission of the trial court in chambers to interrogate prospective jurors as to their interest, if any, in the Underwriters at Lloyds of London. This was supported by an affidavit by plaintiff stating on information and belief that this company had a number of employes in Cook county and there

RUSSELL S. MOORE, Appellee,

vs.

WILLIAM L. EDWARDS, LAWYER J.
KOLLAH, DUDLEY L. DEWEY, KILLOGG
HUNTINGTON, and ILLINOIS BRICK
COMPANY, a corporation,
Defendants

On Appeal of WILLIAM L. EDWARDS,
LAWYER J. KOLLAH and DUDLEY L.
DEWEY,
Appellants

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the above named defendants to recover damages for injuries received on a toboggan slide operated by Edwards, Kollath and Dewey. The cause was dismissed as to defendants Kelllogg Huntington and Illinois Brick Company. The jury returned a verdict finding the remaining defendants guilty and assessing plaintiff's damages at \$12,500. These defendants appeal from the judgment.

Plaintiff introduced evidence tending to show that defendants were negligent in the operation of the toboggan slide by permitting a dangerous ditch to traverse the toboggan runway. Defendant first says the trial court improperly permitted a disclosure to the jurors on their voir dire that a foreign insurance company had insured defendant against claims such as were involved. Before examining the prospective jurors the attorneys for plaintiff asked permission of the trial court in chambers to interrogate prospective jurors as to their interest, if any, in the Underwriters at Lloyd's of London. This was refused by an affidavit by plaintiff stating on information and belief that this company had a number of employees in Cook county and that

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were others in Cook county financially interested in this company, A counter-affidavit filed by the trial attorney for the defendants stated that the insurance company which wrote the policies insuring the defendants in this case was R.N.Crawford & Co., which had 28 employes; that the investigators making the investigation of this case was the firm of Toplis & Harding, which had 65 employes, and that the attorneys employed to defend against plaintiff's claim was the firm of Ekern & Meyers. The counter-affidavit stated that no officer, agent or employe of any of these firms was "on the present jury panel," and that no other agent, investigator or attorney for any of the Underwriters at Lloyds had any financial interest in the outcome of the litigation. Counsel for plaintiff point out that the counter-affidavit fails to deny the possibility that other agents, investigators or other employes of the Underwriters at Lloyds might at that very time have been sitting on the jury panel.

The court permitted plaintiff's counsel to ask prospective jurors as to whether they had any connection with any company that makes a practice of defending cases of this kind, or, "Do any of you have any connection with the Underwriters, Lloyds of London?" The answer of the prospective jurors was in the negative. Counsel for defendants argue that these questions were improper, citing Kavanaugh v. Parret, 379 Ill. 273. The counter-affidavit by the defendant in that case was positive in showing that plaintiff's rights could not have been prejudiced in the trial before the panel of the jurors then in court. The affidavit specifically named all of the jurors on the panel and stated that none of them was interested in any way whatever in the affairs of the insurance company. In addition there was testimony that none of the jurors had any interest in the company.

The practice in the instant case was approved in Smithers v. Henriquez, 368 Ill. 588. That case has been followed in a number

were others in Cook county financially interested in this company,

A counter-affidavit filed by the trial attorney for the

defendants stated that the insurance company which wrote the

policies insuring the defendants in this case was W. H. Crawford & Co.,

which had 28 employees; that the investigators making the

investigation of this case as the firm of Toplis & Harding, which

had 65 employees, and that the attorneys employed to defend against

plaintiff's claim was the firm of Urban & Meyer. The counter-

affidavit stated that no officer, agent or employe of any of these

firms was "on the present jury panel," and that no other agent,

investigator or attorney for any of the Underwriters at Lloyd's

had any financial interest in the outcome of the litigation. Counsel

for plaintiff point out that the counter-affidavit fails to deny the

possibility that other agents, investigators or other employees

of the Underwriters at Lloyd's might at that very time have been

sitting on the jury panel.

The court permitted plaintiff's counsel to ask prospective

jurors as to whether they had any connection with any company

that makes a practice of defending cases of this kind, or "do any

of you have any connection with the Underwriters, Lloyd's of London?"

The answer of the prospective jurors was in the negative. Counsel

for defendants argue that these questions were improper, citing

Kavanaugh v. Parrot, 379 Ill. 273. The counter-affidavit by the

defendant in that case was positive in showing that plaintiff's

rights could not have been prejudiced in the trial before the

panel of the jurors then in court. The affidavit specifically

named all of the jurors on the panel and stated that none of them

was interested in any way whatever in the affairs of the

insurance company. In addition there was testimony that none of

the jurors had any interest in the company.

The practice in the instant case was approved in Winters v.

Henriques, 368 Ill. 588. That case has been followed in a number

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of subsequent cases. In O'Neal v. Caffarello, 303 Ill. App.574, the questions permitted to be put to the respective jurors were substantially the same as those in the instant case. It is significant that in response to those questions in the O'Neal case a venireman answered that he was connected with Lloyds and was excused with the consent of both parties. The questions put to the respective jurors in the instant case might have resulted in the same way, which emphasizes the duty of an attorney to his client to make all reasonable inquiries as to the interest of the prospective jurors in the outcome of the litigation. Also might be noted the opinion of this court in a case where the facts are very much the same as ^{those} here. (Halladay v. Olympia Fields Country Club, 295 Ill. App. (abst.) 622.) In that case counsel for plaintiff followed the procedure approved in the Smithers case and we there held there was no reversible error in this respect. In the Halladay case, where the plaintiff was injured on a toboggan slide, we affirmed a judgment for \$20,000. In the instant case the amount of the judgment-\$12,500, is not questioned. In Smullen v. Aronson, 253 Ill. App. 540, reversal of the judgment was refused as it was apparent from the size of the verdict that the jury was not influenced by the reference of a juror to the insurance company. The test of all such cases is whether counsel used good faith in his request to be permitted to interrogate the prospective jurors as to their interests in any liability insurance company. Here the good faith of plaintiff's counsel is evident and the procedure followed has been approved in many cases/^{cited} in 56 A. L. R. 1454; 105 A. L. R. 1330.

The accident happened on the evening of December 29, 1938; defendants were operating a toboggan slide near north California avenue in Chicago; the slide consisted of a tower or platform

of subsequent cases. In Wheeler v. California, 339 U.S. 640, 1950, the questions permitted to be put to the respective juries were substantially the same as those in the instant case. It is significant that in response to those questions in the instant case a verdict was returned that he was connected with Hilda and was exonerated with the consent of both parties. The questions put to the respective juries in the instant case might have been put in the same way, which emphasizes the duty of an attorney to attempt to make all reasonable inquiries as to the interest of the prospective jurors in the outcome of the litigation. And might be noted the opinion of this court in a case where the facts are very much the same as ^{these} Halliday v. Illinois Field County High, 339 U.S. 111, App. (abst.) 522. In that case counsel for plaintiff followed the procedure approved in the Halliday case and we there said there was no reversible error in this respect. In the Halliday case, where the plaintiff was injured on a telephone slide, we affirmed judgment for \$20,000. In the instant case the amount of the judgment-\$12,500, is not questioned. In Wheeler v. California, 339 U.S. 640, reversal of the judgment was refused as it was apparent from the size of the verdict that the jury was not influenced by the reference of a juror to the instant case. The fact of all such cases is that counsel could not rely in his request to be permitted to interrogate the prospective jurors as to their interests in any liability insurance company. Here the good faith of plaintiff's counsel is evident and the procedure followed has been approved in many cases. In 50 U.S. 114; 103 A.2d 1130.

The accident happened on the evening of October 22, 1950; defendants were operating a telephone slide near North California Avenue in Chicago; the slide consisted of a tower of platforms

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39 feet above the ground level; a ramp ran from the top of the tower to the ground, 254 feet long; on the ground runway, approximately 720 feet from the top of the tower, a ditch ran at right angles to the runway; it was 6 or 8 feet wide and from 12 to 15 inches deep at its deepest portion.

Plaintiff, then 39 years of age, with his daughter and two of her young girl friends, went to the slide at about 8:30 o'clock on the evening of December 29; none of them had ever been there before and none knew of the existence of the ditch.

Customers might rent a toboggan sled at \$1 an hour, or if their own was furnished the cost was 50 cents an hour. Plaintiff owned a toboggan sled and it was used on this occasion. He made arrangements with a Mrs. Kollath, the cashier, for the use of the slide, paying her 50 cents for one hour.

The three girls sat in the forward part of the sled and the plaintiff at the rear; the ride down was smooth but when the sled struck the ditch plaintiff felt a jolt and rolled off the sled; one of the girls sustained minor injuries; plaintiff attempted to rise but was unable to do so and remained lying on the ground while assistance was sought; he was taken home and the next morning removed to a hospital where he remained until February 6. Plaintiff sustained a broken back which was immobilized in a heavy cast which remained for some considerable time even after he left the hospital; at home he was supplied with a hospital bed especially designed for treatment of fractures of the back; he was unable to return to work until after the following Labor Day; heart complications developed during his convalescence; he incurred large expenses which were proved at the trial, and at the time he was still suffering from pains in his back. There is no claim that the verdict is excessive.

When plaintiff approached Mrs. Kollath, the cashier at the

3 feet above the ground level; a ramp ran from the top of the tower to the ground, 204 feet long; on the ground runway, approximately 720 feet from the top of the tower, a ditch ran at right angles to the runway; it was 6 or 8 feet wide and from 12 to 18 inches deep at its deepest portion.

Plaintiff, then 39 years of age, with two daughters and two of her young girl friends, went to the slide at about 8:30 o'clock on the evening of December 29; none of them had ever been there before and none knew of the existence of the slide.

Customers might rent a toboggan sled at 11 an hour, or if their own was furnished the cost was 50 cents an hour. Plaintiff owned a toboggan sled and it was used on this occasion. He made arrangements with a Mrs. Kolath, the cashier, for the use of the slide, paying her 50 cents for one hour.

The three girls sat in the forward part of the sled and the plaintiff at the rear; the ride down was smooth but when the sled struck the ditch plaintiff felt a jolt and rolled off the sled; one of the girls sustained minor injuries; plaintiff attempted to rise but was unable to do so and remained lying on the ground while assistance was sought; he was taken home and the next morning removed to a hospital where he remained until February 6. Plaintiff sustained a broken back which was immobilized in a heavy cast which remained for some considerable time even after he left the hospital; at home he was supplied with a hospital bed especially designed for treatment of fractures of the back; he was unable to return to work until after the following Labor Day; heart complications developed during his convalescence; he incurred large expenses which were proved at the trial, and at the time he was still suffering from pains in his back. There is no claim that the verdict is excessive.

When plaintiff approached Mrs. Kolath, the cashier at the

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toboggan slide, to obtain a ticket, he was asked by her to register on a card giving his name, address and telephone number; he wrote these on a card which is in the record; it is yellow in color, about 6 inches long by 4 inches wide; the upper 2 inches is detachable and after plaintiff had signed on the lower part this upper part was detached and given to him and the lower part retained by the cashier. On this lower part, immediately above the name of plaintiff in prominent type are the words "Return This Receipt;" above this in small, rather obscure type, are words purporting, on the part of plaintiff, to release defendants from all liability from any and all injuries which may be sustained, it being the intention to assume all risks from the use of the equipment or otherwise.

This portion of the so-called receipt was introduced in evidence and defendants argue that this was a release by plaintiff of all liability on the part of the defendants; that the court erroneously instructed the jury that this release was no bar to this suit if they believed there was induced in plaintiff's mind the belief that he was ^{not} assuming any risk or releasing any claim. It is argued that it is the law that whoever signs any agreement or release is presumed to act with knowledge of what he has signed. At defendants' request the court also instructed the jury that if it believed plaintiff "knowingly affixed his signature to the instrument" the verdict as to the defendants must be not guilty.

It is well settled law that where an alleged release is obtained by practices tending to deceive the party asked to sign it, it will not be obligatory on him. In C. R. I. & P. Ry. Co. v. Lewis, 109 Ill. 120, 129, it was held that where a plaintiff was induced to sign a release "under the belief, created by defendant's agents, she was simply signing a receipt for expenses, defendant would not be permitted to plead it as a defence to the action."

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That would be to have an advantage from its/^{own}wrong, which the law will not tolerate." In Pioneer Cooperage Co. v. Romanowicz, 186 Ill. 9, the jury was instructed that where the signature of the plaintiff was secured by being told that it was only for the purpose of securing the services of a physician, and plaintiff so believed, a release so procured would not be binding upon the plaintiff. See also Savage v. Chicago & Joliet Ry. Co., 142 Ill. App. 342, and many other cases. In the present case no one called plaintiff's attention to the small printed matter on the card which purported to release defendants from all liability. He did not know of such conditions and hence could not have agreed to them. The simple request that he register his name, the make-up of the card bearing in bold type the word "Receipt," the delivery to plaintiff of the detached portion which contained only the rates of charges for using the slide and the retaining by defendants' agent of the part containing the purported release of liability--these, with other circumstances would justify the jury in concluding that plaintiff was intentionally misled and would not be bound by the release.

Defendants say that plaintiff was told that the use of a toboggan sled with steel runners was forbidden. Plaintiff testified that nothing was said to him about steel runners on his sled. Moreover, there was evidence of other patrons using sleds with wooden runners who ran into the ditch at about the same time as plaintiff's accident.

It is also argued by defendants' counsel that there was a large sign above and back of the cashier's desk warning toboggan riders that they rode at their own risk. Plaintiff testified that he did not see such a sign, and there was testimony by another witness that she did not see the sign. Although there were a number of witnesses for the defendants testifying to the

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presence of such a sign, it was for the jury to weigh the variant testimony and to determine whether there was such a sign and of a character to bind the plaintiff.

The jury could reasonably find that the presence of the ditch on the runway over which persons using the slide would go, was negligence. The very fact that plaintiff was severely injured when his sled ran into it was in itself evidence of negligence. The facts are in many respects like those in Halladay v. Olympia Fields Country Club, 295 Ill. App. 622, where we held that a toboggan slide must be smooth, and the presence of a bump (or in the present case a ditch) was negligence. See also Weifenbach v. White City Const. Co., 201 Ill. App. 521, and Fishbaine v. White Star Line, 224 Mich. 173. In this latter case the plaintiff was injured while riding on a toboggan slide. It was held the questions presented were for the jury to determine and it was error to direct a verdict. There are numerous other cases where persons have been injured while riding on amusement devices and toboggan slides which hold that the law imposes upon the operators a duty to maintain them in a reasonably safe condition for the purpose for which they were intended.

The evidence fully justified the conclusion of the jury, and as there were no reversible errors upon the trial the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

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The evidence fully justified the conclusion of the jury,

and as there were no reversible errors upon the trial the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

WILHELMINA WADE,
Appellant,

v.

VICTORY MUTUAL LIFE INSURANCE
COMPANY, a Corporation,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COLE COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the beneficiary, brought an action on a life insurance policy for \$1,600 issued February 18, 1929, to her husband, Frank E. Wade, by the Victory Life Insurance Company, which in 1933, became insolvent. This policy and other policies were re-insured by defendant, Victory Mutual Life Insurance Company, a newly organized company. There was a trial before the court without a jury, a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that the old company became insolvent and in 1932 a suit in equity was filed in the United States District court, Chicago, and a receiver appointed, who took possession of its assets and all claims against it, including the claims of policy holders. On June 9, 1933, a re-insurance agreement was entered into pursuant to a decree of that court entered May 25, 1933, between the receiver and the old company, which was approved by the United States court. The decree recites that notice was given to all parties, including policy holders of the old insurance company; that the old company is insolvent and that it was necessary for its business to be re-insured. The court found that the proposed insurance agreement, which was attached to the decree, was a fair and reasonable method for continuing the business; it was approved and the receiver directed to enter into the re-insurance agreement with the new company. That the

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STANDARD LIFE, NEW YORK, N.Y.

VICTORY MUTUAL LIFE INSURANCE COMPANY, NEW YORK, N.Y.

RE: VICTORY MUTUAL LIFE INSURANCE COMPANY, NEW YORK, N.Y.

On January 1, 1935, the beneficiary, deceased, was entitled to a life insurance policy for \$1,000 issued January 15, 1935, to her husband, Frank A. Lida, by the Victory Life Insurance Company, which in 1935, became insolvent. This policy was then assigned to the beneficiary by defendant, Victory Mutual Life Insurance Company, a newly organized company. There was a trial between the court without a jury, a finding was returned in favor of the beneficiary and the plaintiff appealed.

The record discloses that the life insurance policy was issued to the beneficiary in 1935 and in 1935 a suit was filed in the trial court. Plaintiff sought, among other things, a declaration of the validity of the assignment of the policy and all claims against it, and the return of the policy proceeds. On June 1, 1935, a judgment was entered in favor of the plaintiff for a sum of \$1,000. On July 1, 1935, between the plaintiff and the defendant, which was approved by the United States court. The court ordered that notice be given to all parties, including policyholders, of the life insurance company; that the life insurance be liquidated and that it was necessary for the proceeds to be paid out. The court found that the proposed insurance agreement, which was assigned to the plaintiff, was a valid and enforceable contract for the purpose of the business; it was approved and the proceeds assigned to the plaintiff. That the

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re-insurance agreement was to be submitted to the policyholders and to the insurance department of the State for approval; that "in accordance with the proposed re-insurance agreement, all lien upon policy reserves is to be fixed and is to be based on the fair intrinsic value of the old company assets. All policyholders of the Victory Life Insurance Company [old company] who do not notify the new company of their intention to cancel their policies and take a dividend are to be presumed to want their policies carried in the new company." It was decreed that the court reserve jurisdiction of the cause and of all parties, for the purpose of carrying out the terms and conditions of the decree, the re-insurance agreement and any other matter not fully disposed of, for a period of one year.

Afterward, pursuant to the re-insurance agreement, the receiver and the new company calculated the lien on the policies and February 13, 1934, the Federal court entered an order which recites that the matter came on to be heard on the report of the receiver of the old company and upon receiver's supplemental report. It further recites that due notice was given to all parties, including the holders of policies which were in force June 9, 1933. The court then finds: "that the receiver and the re-insuring company have tentatively computed the lien against the reserves on continued policies at 80% and any adjustment therein to the exact amount of lien hereinafter determined on individual policies on a premium paying basis should be deferred until December 31, 1934, as should the distribution of any profit applicable as of December 31, 1933 to reduce the lien as provided in the contract of reinsurance."

That to save unnecessary actuarial expenses, the new company is permitted to divert the actual application by way of

7-10-1944

1. The following information is being furnished to you for your information:

Collection of the Victoria and Albert Museum

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THE UNITED STATES DEPARTMENT OF THE INTERIOR

for the purpose of carrying out the above mentioned instructions

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Whether or not it will be a long time, the answer is yes.

and February 1, 1984, the Federal court ruled in favor of the

and the thought that we have a lot of work to do and that's all right.

PLEASE PRINT NAME, ADDRESS, PHONE NO. AND MAILING ZIP CODE IN REVERSE

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 1872.

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Income will not influence educational attainment patterns in any way.

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Approved and Forwarded for Release to the Public: _____

Small number of specimens from the same locality as above.

Applicable as at December 31, 1992 for periods then ended

1. Содержание

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U. S. GOVERNMENT PRINTING OFFICE: 1964

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credit to any reserve value of any converted or continued policies, "the difference between the tentative computation of dividend of 40 per cent and corresponding lien of 60 per cent, and that actually determined " " ", provided, however, that wherever any policy goes on a non-premium paying basis the reinsuring company shall compute the actual credit to such reserve resulting from the distribution of said items. That from this date and until December 31, 1934 the reinsuring company may operate the business under the tentative lien of 60 per cent heretofore used, making necessary adjustments at December 31, 1934, except in the case of policies terminated." The court retained jurisdiction "of this cause and of all parties hereto including the Victory Mutual Life Insurance Company, for the purpose of carrying out the terms of this order."

Afterward, September 25, 1934, defendant, the new company, filed its petition in the Federal court, requesting instructions of the court "regarding the distribution by it of earnings on account of re-insured business and on account of the revaluation of assets on account of the contract of re-insurance," in which it was averred that since the entry of the decree of May 25, 1933, it, the new company, had ascertained that no provision was made in calculating the lien for a surplus of \$100,000 which the Insurance Department of the State said was necessary for the new company to continue in the insurance business. That it had caused a revaluation of some of the assets of the company; that under the terms of the re-insurance contract and the order or decree entered February 13, 1934, it was required to distribute as of December 31, 1934, and periodically thereafter, all of the current earnings of the re-insured business in reduction of the lien on the assumed business; "and also to distribute similarly as of said date the difference between the tentatively computed lien of 60% and the actual lien of

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57.092% fixed by this court;" that it was necessary to have a construction of the re-insurance contract by the court and that a supplemental agreement, a copy of which was attached to the petition, be approved. It was further alleged that the receiver and all policyholders had been given notice, and the prayer was that the court construe the re-insurance contract and that the receiver be authorized to enter into the supplemental contract.

On the same day, the Federal court entered an order which recites the matter came on to be heard on defendant's verified petition and the answer of the receiver. The court then found that "in the decree entered May 25, 1933 this court reserved jurisdiction of this cause and of all parties hereto for the purpose of carrying out the terms and conditions of the decree and the reinsurance contract, and for the further purpose of disposing of any matter not in the order and decree fully disposed of. * * * That "to enable the defendant to comply with the requirements of the Illinois Insurance Department and to become licensed to do business" in other States there should be a "free surplus of \$100,000 by which its assets should exceed its liabilities."

That the order of "February 13, 1934 fixing the percentage of lien on continued policies * * * did not take into account the creation of such an item of surplus." The court found that the supplemental agreement "is fair and equitable as regards policyholders and creditors * * *. That due notice has been given by mail to all policyholders and creditors;" that the contract of re-insurance "should be construed and carried out by the re-insuring company as hereinafter provided." The new company was authorized to revalue its assets as per schedule attached to its petition; and "that the contract of re-insurance 'any provisions thereof to the contrary

BY COURT fixed by this court; that it was made only in favor of
contractors of the re-insurance company in the event and that
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an attempt to enter into the contractual agreement.
On the same day, the Federal court entered an order which
twice the matter came on to be heard on documents submitted
petition and the amount of the recovery. The court then found that
"in the event entered day 2, 1933 this court entered judgment
of this court and of all parties herein for the recovery of money
out the terms and conditions of the contract and the re-insurance
contract, and for the further purpose of disposing of the matter
not in the order and hence fully satisfied. That the
the defendant to comply with the provisions of the contract
Insurance Department and an order directed to be entered in that
states there should be a three months or 12,000 by which the
assets should be liquidated.
That the order of February 12, 1933 fixing the amount of
lien on continued policies - " - did not take account the
exclusion of such an item of assets. The court found that the
fundamental agreement "is fair and equitable as a whole - particularly
to and creditors" - " - that the notice had been given by all to
all policyholders and creditors; that the contract of re-insurance
"should be construed and carried out in the re-insurance company as
hereinafter provided." The court accordingly was authorized to require
the assets as per schedule attached to the petition and that the
amount of re-insurance, any provisions contrary to the foregoing

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notwithstanding shall be construed and carried out by the re-insuring company as hereinafter provided and the re-insuring company and the Receiver be and they are hereby authorized to make a supplemental agreement embodying' a number of provisions, one of which is that the 'net current earnings from business assumed or converted under the contract of re-insurance as therein defined, which term when hereinafter used shall include difference between tentative 60% lien and actual lien referred to in the order entered herein February 13, 1934, thus in effect making the initial lien 60%, anything in said order to the contrary notwithstanding.'

On the hearing, certain pleadings, orders and decrees entered in the Federal court were offered and received in evidence and, without going into detail, we think they were all properly admitted. There is no contention but that they spoke the truth. It was stipulated and agreed by the parties that the records of the defendant, the new insurance company, pertaining to the policy involved, showed that it 'lapsed for non-payment of premium due on August 18, 1934; that on that date the gross value of the policy was \$90.75 with loan indebtedness of \$11.00. The lien indebtedness used by the company was 60%, which, with interest, amounted to \$31.49. Deducting the loan indebtedness and the lien indebtedness with interest from the gross value of the policy leaves a resulting net cash value of the policy of \$47.36. This net cash value was applied by the company on the purchase of extended insurance for the face amount of the policy, less indebtedness, namely, \$1,458.00, for 3 years and 56 days from the date of lapse, expiring October 13, 1937.' * * *

'If the lien indebtedness is figured at 57 1/10%, instead of the 60% used by the company, and the other facts being the same with reference to gross value and loan indebtedness as stated above,

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then the net cash value of the policy at date of lapse would have been \$48.88, which would have been sufficient to purchase extended insurance of \$1,456.00 for 3 years and 93 days, expiring November 19, 1937." The insured, Frank B. Wade, died November 17, 1937.

Plaintiff's contention is that the 57.1% is the proper percentage to be used in computing the lien indebtedness against the policy and therefore the net cash value of the policy would purchase extended insurance to November 19, 1937, 2 days after the insured died, and therefore the policy was in full force and effect at the time of Wade's death. On the other side, defendant's position is that 80% is the proper percentage to be used in computing the indebtedness, and when this percentage is used, the net cash value of the policy would purchase ^{extended} insurance which would expire October 13, 1937, 35 days before Wade's death, therefore the policy had lapsed and the judgment of the court in defendant's favor should be affirmed.

Counsel for plaintiff contend that in case of ambiguity contracts of insurance and of re-insurance should be liberally construed in favor of the insured so as to prevent a forfeiture and that where the language of such contracts is of doubtful meaning, reference may be had to the pleadings of the case. We think this is a correct statement of the law. Great Northern Life Ins. Co. v. Fed. Life Ins. Co., 260 Ill. App. 369. And counsel argue that applying this rule of construction to the facts in the case at bar, it follows that 57.1% is the proper percentage to apply in calculating the value of the policy in question that this was the percentage found in the decree of the Federal court entered May 25, 1933, and that this fact was not changed by the orders of February 13, or September 25, 1934.

from the net cash value of the policy at issue of \$100,000.00
have been \$22,500.00, which would have been sufficient to pay the
extended insurance of \$1,440.00 for a year and a half, but the
November 15, 1937. The insured, Frank A. Smith, died November 15,
1937.

Plaintiff's contention is that the \$7.18 is the proper
percentage to be used in computing the net cash value of the policy when
the policy and therefore the net cash value of the policy when
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1937. The insured and the judgment of the court in defendant's favor would
be affirmed.

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equities of insurance and of re-insurance should be primarily con-
sidered in favor of the insured so as to prevent a forfeiture and that
where the language of such contract is not unambiguously
retained may be held to the advantage of the insured. In 1937 this is
a correct statement of the law. Frank A. Smith v. The Mutual Life Insurance Company of New York, 200 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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We have above set forth ^{rather} fully the pertinent provisions of the orders or decree of May 25, 1933, and February 13 and September 25, 1934, and we think, upon a consideration of them, it appears that when the decree of 1933 was entered, the value of the assets of the old company was more or less uncertain - could not be determined definitely and the requirements of the Insurance Department were not fully understood. When it afterward developed that the Insurance Department of the State required there be a surplus of \$100,000 so that defendant would not have to go out of business, with the result of practically destroying the value of all the policies, the matter was taken up February 13, 1934, with the Federal court. It had retained jurisdiction for 1 year by its decree of 1933, and later, in September, 1934, all of the parties were before the court, including the policyholders. The court construed its decrees and orders and definitely fixed 60% as the proper basis to be used in computing the lien indebtedness. Although all of the policyholders, including the one in suit, were notified of all of the proceedings in the Federal court, so far as the record discloses, Wade made no objection to the orders entered. In these circumstances we feel that we are bound by what the Federal court did, and the matter ought not to be relitigated. James Blackstone Memorial Library Assn. v. Alton R. R. Co., 316 Ill. App. 70, and cases there cited.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

JUDGMENT AFFIRMED.

affirmed.

The judgment of the Circuit court of Cook county is

Ill. App. 70, and cases there cited.

James Blackstone Memorial Library Assn. v. Alton R. Co., 316

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We have above set forth fully the pertinent provisions

42175

316 I.A. 455

CHICAGO TITLE AND TRUST COMPANY, a
Corporation, Successor Trustee,

v.

YETTA GOTTSCHALK, et al.,

HARRY J. PAUL,

Appellee,

LIBERTY NATIONAL BANK OF CHICAGO,
As Trustee under Trust No. 3270,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Liberty National Bank of Chicago, as trustee, seeks to reverse an order of the Superior Court of Cook county, modifying a decree entered in a foreclosure suit.

The record discloses that May 28, 1931, the Chicago Title and Trust Company, as successor trustee, filed its bill to foreclose the lien of a trust deed dated May 7, 1928, given to secure the payment of \$125,000, evidenced by 227 bonds. There was a second trust deed dated May 29, 1928 on the property executed by the same parties, the owners of the premises, to secure an indebtedness of \$14,000, in which the Chicago Title and Trust Company was named as trustee. The trustee of the second mortgage, the bondholders of each mortgage, and other parties were made defendants. A decree of foreclosure was entered November 21, 1935. In the decree it was found that in accordance with a certain agreement dated October 18, 1930, entered into between the Schiff Trust & Savings Bank, which was named as trustee in the first trust deed, and the legal holders and owners of bonds numbered 1 to 9, both inclusive, the payment of such bonds and certain interest coupons was subordinated

CHICAGO TITLE AND TRUST COMPANY,
Corporation, Successor Trustee,

YETTA GORTSCHALK, et al.,

Appellee,

LIBERTY NATIONAL BANK OF CHICAGO,
As Trustee under Trust No. 3273,
Appellant.

MR. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT.

By this appeal the Liberty National Bank of Chicago, as trustee, seeks to reverse an order of the Superior Court of Cook County, modifying a decree entered in a foreclosure suit. The record discloses that May 26, 1931, the Chicago Title and Trust Company, as successor trustee, filed its bill to foreclose the lien of a trust deed dated May 7, 1928, given to secure the payment of \$125,000, evidenced by 327 bonds. There was a second trust deed dated May 29, 1928 on the property executed by the same parties, the owners of the premises, to secure an indebtedness of \$14,000, in which the Chicago Title and Trust Company was named as trustee. The trustee of the second mortgage, the bondholders of each mortgage, and other parties were made defendants. A decree of foreclosure was entered November 21, 1932. In the decree it was found that in accordance with a certain agreement dated between 18, 1930, entered into between the Merchants Trust & Savings Bank, which was named as trustee in the first trust deed, and the legal holders and owners of bonds numbered 1 to 9, both inclusive, the payment of each bond and certain interest coupons was guaranteed

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to the lien of bonds numbered 10 to 277, both inclusive, and were so stamped. It was further found that the suit had been instituted on behalf of all of the owners and holders of all the bonds and interest coupons. The decree followed the report of the master to whom the cause was referred and found (1) that the Chicago Title and Trust Company, as successor trustee, had a prior and paramount lien for costs, solicitors' fees and other expenses of \$6,149.50; (2) that there was due to the successor trustee for the benefit of all owners and holders of specified unsubordinated interest coupons, \$8,945.24; (3) that there was due and owing to the successor trustee for the benefit of the owners and holders of the unsubordinated bonds and interest coupons, \$150,553.69; and (4) that there was due and owing to the successor trustee for the benefit of all owners and holders of the subordinated bonds and interest coupons, \$21,779.53, which was subject to the lien of the three above mentioned sums. And it was decreed that defendants, the makers of the bonds, pay the four sums within a specified time and in default of such payment, the property be sold and from the proceeds of the sale the four sums be paid according to their priorities. The property has not yet been sold.

September 9, 1941, which was more than 5 years after the foreclosure decree, Harry J. Paul, by leave of court, filed his verified petition in which he averred that he was the owner of the subordinated bonds and coupons; that the decree of foreclosure provided for the sale of the property to satisfy the lien of all of the bonds, including his; that the premises had been offered for sale a number of times but that no sale had been approved by the court; that the decree found the suit was filed as a representative one for the benefit of the owners and holders of all of the bonds secured by the trust deed and that such finding "was not

to the lien of bonds numbered 10 to 177, both inclusive, and were so stamped. It was further found that the said had been included on behalf of all of the owners and holders of all the bonds and interest coupons. The decree followed the report of the master to whom the cause was referred and found (1) that the Chicago Title and Trust Company, as successor trustee, had a prior and paramount lien for costs, solicitor's fees and other expenses of \$2,140.00; (2) that there was due to the successor trustee for the benefit of all owners and holders of specified unsubordinated interest coupons, \$8,945.24; (3) that there was due and owing to the successor trustee for the benefit of the owners and holders of the unsubordinated bonds and interest coupons, \$150,505.52; and (4) that there was due and owing to the successor trustee for the benefit of all owners and holders of the unsubordinated bonds and interest coupons, \$1,779.56, which was subject to the lien of the three above mentioned sums. And it was decreed that defendants, the makers of the bonds, pay the four sums within a specified time and in default of such payment, the property be sold and from the proceeds of the sale the four sums be paid according to their priorities. The property had not yet been sold. September 3, 1941, which was more than 5 years after the for closure decree, Harry J. Hall, by leave of court, filed his verified petition in which he averred that he was the owner of the unsubordinated bonds and coupons; that the decree of foreclosure provided for the sale of the property to satisfy the lien of all of the bonds, including his; that the proceeds had been distributed for sale a number of times but that no sale had been approved by the court; that the decree found the said was filed as a representation one for the benefit of the owners and holders of all of the bonds secured by the trust deed and that such finding "was not

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substantially true, because the interest of the subordinated bonds and interest coupons was adverse and antagonistic to the interest of the unsubordinated bonds and interest coupons;"that the court was evidently not aware of this fact and that the complainant, the successor trustee, "should not have attempted to represent parties whose interests were adverse." The prayer was that the decree of foreclosure be modified by striking from it the following paragraph: "4. To the said complainant, as successor trustee, as aforesaid (for the equal and pro rata use and benefit of all of the owners and holders of the unpaid and subordinated bonds numbered one (1) to nine (9), both inclusive, and the unpaid and subordinated interest coupons, series numbered 1, 2 and 3, respectively, all secured by the said trust deed foreclosed herein), the sum/^{of}\$21,779.53, together with interest thereon."

Upon the filing of the petition by Paul, the Liberty National Bank of Chicago, as trustee under a trust agreement dated January 7, 1941 (known as Trust number 3270) which claimed to be the present owner of the equity of redemption by virtue of the foreclosure of the second mortgage on the property, filed its motion to strike the petition of Paul, setting up as grounds among others the lack of diligence; that under the statute where parties are made defendants as "Unknown Owners" as in the foreclosure suit, ~~they~~ must come in within one year from the date of the entry of the foreclosure decree. The motion to strike Paul's petition was denied and on the same day, November 19, 1931, another order was entered denying the bank's leave to file its petition. The court then entered a third order which recites that Paul's petition to amend the decree of foreclosure came on to be heard and the court found it had jurisdiction; that the decree of foreclosure had directed the sale of the property for the benefit of all bondholders, including the owners of the subordinated bonds and

substantially true, because the interest of the subordinated bonds and interest coupons are superior and antecedent to the interest of the unsubordinated bonds and interest coupons; that the court was evidently not aware of this fact and that the complainant, the successor trustee, should not have attempted to represent parties whose interests were adverse." The prayer is that the decree of foreclosure be modified by striking from it the following paragraph: "4. In the said complaint, as successor trustee, as aforesaid (for the equal and pro rata and benefit of all of the owners and holders of the unpaid and subordinated bonds numbered one (1) to nine (9), both inclusive, and the unpaid and subordinated interest coupons, series numbered 1, 2 and 3, respectively, all secured by the said first deed foreclosed herein), the sum of \$21,773.52, together with interest thereon."

Upon the filing of the petition by Paul, the deputy National Bank of Chicago, as trustee under a trust agreement dated January 7, 1941 (known as Trust number 3270) which claimed to be the present owner of the equity of redemption by virtue of the foreclosure of the second mortgage on the property, filed its petition to strike the petition of Paul, setting up as grounds among others the lack of diligence; that under the statute where parties are made defendants as "Unknown Owners" as in the foreclosing suit, they must come in within one year from the date of the entry of the foreclosure decree. The motion to strike Paul's petition was denied and on the same day, November 12, 1951, another order was entered denying the bank's leave to file its petition. The court then entered a third order which recited that Paul's petition to amend the decree of foreclosure came on to be heard and the court found it had jurisdiction; that the decree of foreclosure had directed the sale of the property for the benefit of all bondholders, including the owners of the subordinated bonds and

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coupons, but that such owners, "could never benefit from such a sale because the value of the property to be sold is far under the amount due on the subordinated bonds, "and that in order to give them relief to which they were entitled, "the directory or executory portion of the decree should be amended and modified so that the lien of said subordinated bonds and interest coupons are [is] not liquidated in this proceeding;" that the property should be sold "only for the benefit of the unsubordinated bonds and prior charges and that the holders and owners of the subordinated bonds and interest coupons have a lien upon said property subordinate only to the lien of the plaintiff as representative of the unsubordinated bondholders;" and the decree of foreclosure was modified by striking out paragraph 4, of the decree above quoted.

December 8, 1941, following, the motion of the bank for leave to file its petition instanter, praying for the vacation of the orders entered November 19, and for leave to appear and defend against Paul's petition, was denied. The petition of the bank submitted at that time set up a number of facts/^{that} had taken place in the foreclosure suit, i.e., that after the entry of the decree, the owners and holders of the second mortgage agreed to sell the securities to Jack Schuman, and that thereupon he caused his attorneys to examine the foreclosure decree and relying upon the record, purchased the junior mortgage, brought foreclosure proceedings, a decree was entered, and the property sold August 7, 1939; afterward the property was sold in that proceeding by the master to Schuman and after the period of redemption had expired, at his direction, a master's deed was issued to the Liberty National Bank of Chicago, as trustee.

The petition further set up that Paul was not the owner of the subordinated bonds or interest coupons; that they had been paid for by Philip Plonsky, the former owner of the equity of

coupons, but that such owners, "could never benefit from such a sale because the value of the property to be sold is far under the amount due of the subordinated bonds," and that in order to give them relief to which they were entitled, "the directors or executive portion of the decree should be amended and modified so that the lien of said subordinated bonds and interest coupons and prior charges and that the holder and owners of the subordinated bonds and interest coupons have a lien upon said property subordinated only to the lien of the plaintiff as representative of the unsubordinated bondholders;" and the decree of foreclosure was modified by striking out paragraph 4, of the decree above quoted.

December 8, 1941, following, the action of the bank for leave to file its petition in bankruptcy, praying for the vacation of the orders entered November 10, and for leave to appear and defend against Paul's petition, was denied. The petition of the bank submitted at that time set up a number of facts which in the foreclosure suit, i.e., that after the entry of the decree, the owners and holders of the second mortgage agreed to sell the securities to Jack Schuman, and that thereupon he caused his attorneys to examine the foreclosure decree and relying upon the record, purchased the junior mortgage, brought foreclosure proceedings a decree was entered, and the property sold August 7, 1939; afterward the property was sold in that proceeding by the master to Schuman and after the period of redemption had expired, at his direction, a master's deed was issued to the Liberty National Bank of Chicago, as trustee.

The petition further set up that Paul was not the owner of the subordinated bonds or interest coupons; that they had been paid for by Philip Blomsky, the former owner of the equity of

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redemption; that Paul never purchased the bonds but in fact was acting for Plonsky.

No brief has been filed on behalf of plaintiff, the Chicago Title and Trust Company, successor trustee, and an examination of the record discloses that on the hearing one of its counsel stated that it had attempted to remain neutral. We think this is a misapprehension. The successor trustee brought the suit to enforce the rights of all of the stockholders and we think it was counsel's duty to protect the decree so that the matter might be determined. "It is just as important that there should be a place to end as that there should be a place to begin litigation." Stoll v. Gottlieb, 305 U. S. 165.

There is considerable argument pro and con as to the power of the court to disturb the foreclosure decree, more than 5 years after it had been entered. The general rule that a court has no authority or jurisdiction to change the final decree at a subsequent term of court, applies to that part of a decree fixing the right of the parties to the action, but is subject to the exception as to the executory part providing for the enforcement of rights. Dillenburg v. Hellgren, 291 Ill. App. 448; Dillenburg v. Hellgren, 371 Ill. 452; and Dillenburg v. Hellgren, 304 Ill. App. 51. In that case there was a foreclosure and a sale of property. The trust deed involved was executed April 16, 1921; the decree of foreclosure was entered December 20, 1933, and amended February 8, 1937. The property was sold pursuant to the laws of 1921 and it was held the sale was invalid as it should have been in accordance with the act of 1917. The decree was amended accordingly and was affirmed by the Appellate court. After the affirmance there were further proceedings and an appeal taken direct to the Supreme court (371 Ill. 452) but the cause was transferred to the Appellate court on the ground that no

redemption; that Paul never purchased the bonds but in fact was acting for Pionarsky.

No brief has been filed on behalf of Plaintiff, the Chicago Title and Trust Company, successor trustee, and an explanation of the record discloses that on the hearing one of its counsel stated that it had attempted to remain neutral. I think this is a misapprehension. The successor trustee brought the suit to enforce the rights of all of the stockholders and we think it was counsel's duty to protect the decree so that the matter might be determined. It is just as important that there should be a place to and as that there should be a place to begin litigation. Stoll v. Gottlieb, 306 U. S. 166.

There is considerable argument pro and con as to the power of the court to disturb the foreclosure decree, more than 5 years after it had been entered. The general rule that a court has no authority or jurisdiction to change the final decree at a subsequent term of court, applies to that part of a decree fixing the right of the parties to the action, but is subject to the exception as to the executory part providing for the enforcement of rights. Dillenburg v. Helikman, 301 Ill. App. 443; Dillenburg v. Helikman, 371 Ill. 452; and Dillenburg v. Helikman, 304 Ill. App. 51. In that case there was a foreclosure and a sale of property. The trust deed involved was executed April 16, 1921; the decree of foreclosure was entered December 20, 1923, and amended February 8, 1927. The property was sold pursuant to the law of 1921 and it was held the sale was invalid as it should have been in accordance with the act of 1917. The decree was amended accordingly and was affirmed by the appellate court. After the affirmance there were further proceedings and an appeal taken direct to the supreme court (371 Ill. 452) but the case was transferred to the appellate court on the ground that no

constitutional question was properly involved. The Appellate court, in speaking of the former appeal to that court said (304 Ill. App. 51): "This court in that case considered that such amendment in no way went to fix the rights or liabilities of the parties; that it was merely modal in character, and that the court had the right to change or amend its decree for the purpose of carrying the same into effect, when such amendment or change was not substantial in character in that it did not tend to enlarge, modify, fix or change the rights or liabilities of the parties."

In the instant case, we think the court was not warranted in amending the decree of foreclosure. The rights of the bondholders had been fixed by the decree and the property was ordered sold (unless the indebtedness were paid) for the benefit of the parties as fixed by the decree. We think the substantive rights of the parties were changed by the modification of the decree and not merely that part of the decree which provides for the enforcement of the rights of the parties. Whether, under the decree as amended, the property could be sold to pay costs, expenses and the amount due to the unsubordinated bondholders, and afterward again sold to pay Paul, as owner of the subordinated bonds, or whether he could bring a further foreclosure to enforce his rights, is not clear. But in any event, if there were a sale of the property, the bank's right to redemption from the sale would be detrimentally affected to the extent of the amount due Paul on the subordinated bonds, viz., \$21,779.53, since it appears that while the property was offered for sale, no sale was approved and the court found, as we have above quoted, that the property would not sell for the amount due on the unsubordinated bonds.

There is no merit to the contention advanced by Paul in his petition to amend the decree, that the plaintiff, (the successor

constitutional question was properly involved. The Court said in speaking of the former appeal to that court, (304 Ill. App. 31): "The court in that case considered that such amendment in no way went to fix the rights or liabilities of the parties; that it was merely a change in character, and that the court had the right to amend its decree for the purpose of carrying the same into effect, when such amendment or change was not substantial in character in that it did not tend to enlarge, modify, fix or change the rights or liabilities of the parties."

In the instant case, we think the court was not warranted in amending the decree of foreclosure. The rights of the bondholders had been fixed by the decree and the property was ordered sold (unless the indebtedness were paid) for the benefit of the parties as fixed by the decree. We think the substantive rights of the parties were changed by the modification of the decree and not merely that part of the decree which provides for the enforcement of the rights of the parties. The decree, under the decree as amended, the property could be sold to pay cost, expenses and the amount due to the unsecured bondholders, and afterwards sold to pay Paul, as owner of the secured bonds, or whatever he could bring a further foreclosure to enforce his rights. It was clear. But in any event, if there were a sale of the property, the bank's right to redemption from the sale would be determined by the extent of the amount due Paul on the subordinated bonds, viz., \$21,772.52, since it was then that the property was offered for sale, no sale was approved and the court found, as we have above quoted, that the property would not sell for the amount due on the unsecured bonds.

There is no merit to the contention advanced by Paul in his petition to amend the decree, that the plaintiff, (the assignor

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trustee) could not properly represent his subordinated bonds because his interest was antagonistic to those of the other bondholders whose bonds had not been subordinated. Moreover it conclusively appears - and there is no contention to the contrary - that the rights of the parties were properly fixed by the decree.

The orders of the Superior court of Cook county appealed from are reversed and the cause is remanded with directions to reinstate the decree of foreclosure.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

trustee) could not properly represent his estate and should
because his interest was antagonistic to that of the other
bondholders whose bonds had not been authorized. Moreover it
conclusively appears - and there is no question to the contrary -
that the rights of the parties were properly fixed by the decree.
The orders of the Superior Court of Cook County appealed
from are reversed and the case is remanded with directions to re-
instate the decree of foreclosure.

REVEREND AND HONORABLE JUDGE OF THE COURT.

Hatchett, P. J., and Joseph, J., concur.

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CHRIST SELIMOS,
Appellee,

v.

JOE O'BRIEN,
Defendant below.

RAILWAY EXPRESS AGENCY, INC.,
Garnishee below,
Appellant.

end of vol.
316 I.A. 679
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

ADDITIONAL OPINION.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In our original opinion we reversed the order of the Municipal court and remanded the cause with directions that an appropriate order be entered in harmony with the views expressed in our opinion. Our conclusion was there based on the fact that the judgment upon which plaintiff predicated his right to bring the garnishment suit had become dormant, because it was not revived within seven years, and for that reason was incapable of supporting the action brought.

In his petition for rehearing plaintiff stresses the effect of section 134 of the Justices and Constables act, chap. 79, Ill. Rev. Stat. 1941, which reads: "An action may be brought upon a judgment of a justice of the peace at any time within ten years next after the rendition thereof, and not afterwards. No such action shall be brought upon said judgment in a court of like jurisdiction, within the same county where such judgment may be rendered, until the expiration of seven years next after its rendition." The preceding section (sec. 133), which was cited and relied upon in our opinion, provides: "Execution shall be allowed to issue upon a judgment of a justice of the peace at any time within seven years next after the rendition thereof, and not afterwards." Obviously, these two sections must be considered together, and their plain import is that a judgment become

Abstract

4232

OPPOSITE SERVICE
Appellee,

v.

JOE O'BRIEN,
Defendant below.

ADDITIONAL OPINION.

RAILWAY EMPLOYEES ASSOCIATION, INC.,
Plaintiff below.

MR. JUSTICE FRIEND DULWICKED THE OPINION OF THE COURT.

In our original opinion we reversed the order of the Municipal Court and remanded the cause with directions that an appropriate order be entered in harmony with the views expressed in our opinion. Our conclusion was there based on the fact that the judgment upon which plaintiff predicated his right to bring the garnishment suit had become dormant, inasmuch as it was not revived within seven years, and for that reason was incapable of supporting the action brought.

In his petition for rehearing plaintiff alleges the effect of section 14 of the Judicature and Constabulary Act, Chap. 99, Ill. Rev. Stat. 1941, which reads: "An action may be brought upon a judgment of a justice of the peace at any time within ten years next after the rendition thereof, and not afterwards, in such action shall be brought upon said judgment in a court of like jurisdiction, within the same county where such judgment may be rendered, until the expiration of seven years next after its rendition." The preceding section (Sec. 13), which was cited and relied upon in our opinion, provides: "A motion shall be allowed to issue upon a judgment of a justice of the peace at any time within seven years next after the rendition thereof, and not afterwards." Obviously, these two sections must be considered together, and their plain intent is that a judgment becomes

dormant seven years after its rendition, but between the seventh and tenth years it may be revived. Following its revival the judgment can again support an execution.

In the case at bar more than seven years had elapsed between the date of the entry of the judgment on March 31, 1934, and the issuance of the garnishment writ on November 18, 1941, and since it was not revived within the seven-year period, the judgment was dormant and was incapable of supporting the garnishment proceeding. Under sec. 134 of the Act plaintiff may now revive the judgment at any time within ten years, if he has not already done so.

We adhere to our original opinion holding that the order of the Municipal court is reversed, with directions that the appropriate order be entered in the trial court.

ORDER REVERSED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

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it was not revived within the seven-year period, the judgment was
dormant and was incapable of supporting the garnishment proceeding.

Under sec. 134 of the act a judgment may now revive the judgment
at any time within ten years, if it has not already done so.

We adhere to our original opinion holding that the order
of the Municipal court is reversed, with directions that the
appropriate order be entered in the trial court.

ORDER REVERSED WITH INTEREST.

Sullivan, P. J., and Keenan, J., concur.

42232

CHRIST SELIMOS,
Appellee,

v.

JOE O'BRIEN,
Defendant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

RAILWAY EXPRESS AGENCY,
Inc., Garnishee below,
Appellant.

316 I.A. 670²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

March 31, 1934 plaintiff had judgment against defendant Joe O'Brien, before a justice of the peace in Cicero, Cook county, Illinois, for \$230. Execution issued on the same day and thereafter July 1, 1940 was returned no part satisfied. October 27, 1941 a transcript of the judgment was filed with the clerk of the Municipal court of Chicago and November 18 following a garnishment suit was filed, naming defendant's employer, Railway Express Agency, Inc., garnishee. Garnishee filed its motion to quash the summons in garnishment which had theretofore been served upon it, on the ground that the judgment on which plaintiff based his right to bring the garnishment action was dormant, and therefore incapable of supporting a garnishment suit. Plaintiff thereupon filed a countermotion to strike the garnishee's motion to quash the summons, in which he contended that the motion was insufficient in law, that the garnishee can appear only by attorney, that no appearance was filed by garnishee, and that the motion, if proper, could be set up only by the principal defendant. Upon the hearing of these two motions the court overruled the motion to quash, and this appeal followed.

As the principal ground for reversal it is urged by the garnishee that the judgment on which plaintiff bases his right

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CHRIST BELMOS
Appellee,

v.

JOE O'BRIEN
Defendant.APPEAL FROM MUNICIPAL COURT
OF CHICAGO.RAILWAY EXPRESS AGENCY,
Inc., Garnishee below,
Appellant.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

March 31, 1934 plaintiff had judgment against defendant

Joe O'Brien, before a Justice of the Peace in Cook County, Illinois, for \$230. Execution issued on the same day and thereafter July 1, 1940 was returned no part satisfied. October 27, 1941 a transcript of the judgment was filed with the clerk of the Municipal Court of Chicago and November 18 following a garnishment suit was filed, naming defendant's employer, Railway Express Agency, Inc., garnishee. Garnishee filed its motion to quash the summons in garnishment which had theretofore been served upon it, on the ground that the judgment on which plaintiff based his right to bring the garnishment action was dormant, and therefore incapable of supporting a garnishment suit. Plaintiff thereupon filed a counter-motion to strike the garnishee's motion to quash the summons, in which he contended that the motion was insufficient in law, that the garnishee can appear only by attorney, that no appearance was filed by garnishee, and that the motion, if proper, could be set up only by the principal defendant. Upon the hearing of these two motions the court overruled the motion to quash, and this appeal followed.

As the principal ground for reversal it is urged by the garnishee that the judgment on which plaintiff based his right

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to bring the garnishment suit had become dormant, and for that reason was incapable of supporting the action brought. This contention is predicated upon sec. ^{tion} 133, Justices and Constables Act, chap. ^{le} 79, Ill. Rev. Stats. 1941, ^{Gones v. State Ann. 71-12} which provides: "Execution shall be allowed to issue upon a judgment of a justice of the peace at any time within seven years next after the rendition thereof, and not afterwards." As heretofore set forth, the judgment herein was entered March 31, 1934, more than seven years having elapsed between that date and November 18, 1941, the date on which garnishment proceeding was commenced. The rule is well settled that the existence of a valid judgment against the principal defendant is a jurisdictional prerequisite in a proceeding under the Garnishment Act. First Nat. Bank of Palatine v. Hahnemann Institutions of Chicago, Inc., 356 Ill. 366. Until and unless the judgment in the case at bar was revived, it was not a valid judgment, and therefore the jurisdictional prerequisite was lacking. In the early case of Pierce v. Wade, 19 Ill. App. 185, the garnishee process was issued in September 1883 upon a judgment rendered by a justice of the peace in February 1873, and the only execution ever issued was returned nulla bona in April 1873. The court held that a garnishee may inquire into the legality and regularity of the previous proceedings against the judgment debtor, and that it was the duty of the court, whenever it appeared that the writ of garnishment was improvidently issued, to dismiss the proceedings; that by reason of the lapse of time no execution could have issued upon the judgment, and its vitality was thereby so impaired that it could not be made the foundation for proceedings in garnishment. In the case at bar there was still time within which the judgment could be revived but plaintiff took no steps to do so within the seven-year period, and when the garnishee process was issued the judgment was dormant.

As recently as 1941 the Appellate court of the fourth

to bring the garnishment suit had become dormant, and for that reason was incapable of supporting the action brought. This contention is predicated upon sec. 133, Justices and Constables Act, chap. 79, Ill. Rev. Stat. 1941, which provides: "Execution shall be allowed to issue upon a judgment of a justice of the peace at any time within seven years next after the rendition thereof, and not afterwards." As heretofore set forth, the judgment herein was entered March 31, 1934, more than seven years having elapsed between that date and November 18, 1941, the date on which garnishment proceeding was commenced. The rule is well settled that the existence of a valid judgment against the principal defendant is a jurisdictional prerequisite in a proceeding under the garnishment Act. First Nat. Bank of Palestine v. Mahmoudian Institutions of Chicago, Inc., 356 Ill. 366, 1936. Until and unless the judgment in the case at bar was revived, it was not a valid judgment, and therefore the jurisdictional prerequisite was lacking. In the early case of Pierce v. Wade, 19 Ill. App. 185, the garnishee process was issued in September 1883 upon a judgment rendered by a justice of the peace in February 1883, and the only question ever issued was returned nulla bona in April 1883. The court held that a garnishee may inquire into the legality and regularity of the previous proceedings against the judgment debtor, and that it was the duty of the court, whenever it appeared that the writ of garnishment was improvidently issued, to dismiss the proceedings; that by reason of the lapse of time no execution could have issued upon the judgment, and its vitality was thereby so impaired that it could not be made the foundation for proceedings in garnishment. In the case at bar there was still time within which the judgment could be revived but plaintiff took no steps to do so within the seven-year period, and when the garnishee process was issued the judgment was dormant.

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district held that where judgment on which garnishment proceedings were brought became dormant by expiration of the seven-year period without revival, another judgment creditor holding a subsequent judgment that was not dormant and intervening to claim priority as to the funds garnisheed, was properly held to be entitled to them, and that the mere commencement of the garnishment proceedings within the seven-year period after judgment obtained against the principal defendant was not sufficient to sustain the proceedings where the judgment became dormant during their pendency. Ring Receiver v. Palmer et al., 309 Ill. App. 333. It thus appears that the judgment under consideration had ceased to be a lien by lapse of time, and until revived was incapable of supporting the garnishment suit.

Counsel for plaintiff argues that the record contains no report of proceedings, but the short record filed sufficiently shows the material facts upon which the foregoing conclusion may properly be predicated. It is also urged by plaintiff that defendant had made some payments on account of the judgment as late as November 1941, and it is argued that the judgment was thus revived and never became dormant. Under the authorities, however, we have no recourse except to hold that it was a dormant judgment, and that no garnishment suit could be predicated thereon.

In the light of these conclusions we are of opinion that the court should have sustained garnishee's motion to quash the summons in garnishment, and accordingly the order of the Municipal court is reversed/with directions that the appropriate order be entered in harmony with the views herein expressed.

AND CAUSE REMANDED
ORDER REVERSED/WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

37

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AND CAUSE REMANDED

Sullivan, P. J., and Scamman, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1942.

Term No. 42M5

Agenda No. 1

WILLIAM J. POPP,

Plaintiff-Appellee,

vs.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS, a Corporation,

Defendant-Appellant.

316 I.A. 670³

Appeal from the City
Court of the City of
East St. Louis, Ill.

Hon. William F. Borders,
Trial Judge.

BRISTOW, J.

This appeal grows out of a suit at law brought under the Federal Employers Liability Act by the Appellee whom we shall refer to as plaintiff and against the Terminal Railroad Association of St. Louis, a corporation, appellant, hereinafter referred to as defendant, to recover damages for injuries sustained on July 23rd 1940. Plaintiff was injured while acting as a switchman for the defendant company, and riding on the footboard of a tank car while engaged in a switching operation in Yard No. 2 in East St. Louis, Illinois, whereupon he suffered the loss of both legs, his right leg four inches below the hip and the left three inches below the knee.

The plaintiff charged in his complaint that the defendant company was negligent in the manner in which the switch engine was operated, and that the tracks at the point of the occurrence were in a defective and unsafe state of repair, thus causing the car upon which the plaintiff was riding to swerve and jerk so violently, that plaintiff was thrown therefrom into the path of the moving train.

Defendant's answer denied all charges of negligence and asserted that plaintiff's injuries were a result of his sole

negligence; that plaintiff's injuries were the result of the usual and ordinary risks incident to his employment and further answered in the alternative for the purpose of mitigating damages that the plaintiff was guilty of contributory negligence.

The trial resulted in a verdict for the plaintiff in the sum of \$45,000. Judgment on the verdict in that amount was entered by the trial judge. Afterward, the usual motions for a new trial and judgment notwithstanding the verdict were overruled; consequently this appeal.

Inasmuch as the principal contention made by the defendant here on this appeal is that the jury's verdict is against the manifest weight of the evidence, it becomes necessary for this opinion to outline rather fully the salient facts appearing in evidence. The facts that are undisputed are as follows:- Plaintiff was employed as a switchman on the day of his injury which was July 23rd, 1940. The other members of the switching crew working with him at that time were Carl Kroeck, a switch foreman; Jerry Hollenbock, a switchman; Leo Dockins, an engineer; and Harold Haney, a fireman. At about seven thirty on this warm evening the crew received orders to take twenty cars and a caboose from defendant's No. 2 yard in East St. Louis to the yard of the other railroad company in that city. The track between these two yards ran generally in a northerly and southerly direction and passed under the east approaches of the Eads and Municipal Bridge, the former being northermost and there being a distance of about one mile separating them. After reaching the Municipal Bridge, the tracks in question curve southeasterly until they reach the yard of the Southern Railroad Co. The switching crew coupled up the twenty cars and a caboose, the caboose to the south of the cars, and the engine to the south of the caboose, heading north, so the tank was at the south end of the train. The movement of this train was to the south and

was made with the engine backing up.

On the rear end of the tender which was the leading part of the train, there was located two footboards which were in good condition. Kroeck was riding on the East side of the eastern most footboard. Between him and the coupler head the plaintiff was riding.

The train proceeded to a point about fifteen car lengths north of the Municipal Bridge, where plaintiff's cap blew off and the train came to a stop that the crew might make a search for it. After making a brief but unsuccessful search for the cap, the train proceeded with the crew situated as previously outlined, with the exception that this fireman took the engineers place and switchman Hollenbeck was riding upon the western footboard. After the leading end of the tender had entered the curve, Hollenbeck jumped off the west footboard on the west side of the train. Momentarily thereafter plaintiff met with his accident, whereupon he suffered the loss of both legs. It was a clear, dry, warm July evening.

After plaintiff had fallen Kroeck gave the emergency or "watch out" signal and the train came to a stop within the distance of one or two cars. The plaintiff just prior to his falling had hold of the grab iron on the rear end of the tender. There was nothing wrong with any of the appliance on the tender. It also appears as undisputed that the plaintiff at the time of the accident was 58 years of age, married, had been employed by railroads for thirty six years, and for the defendant company about seventeen years, and that his earnings for the year of 1938 were \$2316 and for 1939, \$2366.

We shall now briefly discuss the facts that are more or less in dispute. Plaintiff Popp testified that as the train proceeded into the curve under the Free Bridge he took out his handkerchief to wipe the perspiration from his forehead, with the

handkerchief in his right hand, and holding on to the grab iron with his left, and that in his best judgment the train was moving twelve to fourteen miles per hour. He further testified that as the tender was entering the curve, it commenced swaying and jerking, and as the train increased in speed, this whipping motion became more violent until as a result thereof, plaintiff was thrown eastwardly across the east rail, and that the speed of the train at the time he was thrown was sixteen to eighteen miles per hour. His testimony further disclosed that at the time he was thrown he grabbed onto some part of the tender and was dragged for two or three car lengths before he was run over. Plaintiff further testified that he had ridden over this curve many times and that the speed of the train was always retarded to about six to eight miles per hour, and that the track at the point of this accident had always been rough and out of line.

Joseph A. Osborne, a consulting engineer, testified that he made an examination of the rails in the track on the curve in question, and at a time when they were in the same condition as the time of the occurrence. He found the rails were old, second-handed, and laid reversely; that is to say they had been taken out of another curve and laid the wrong way, and in some instances were straight instead of being curved, also that there was lipping and the joints were not smoothly connected. He also testified that such a condition would cause a train to whip and jerk and that such swaying would increase with the acceleration of the speed of the train; that at a speed of four to six miles per hour there would be little or no jerking. He further testified that the rails were of varying weights - namely, 75-80 and 100 pounds.

James Walker, a railroad engineer, testified on behalf of the plaintiff as follows: That he had examined the track in question and that a train such as the one involved in the accident could not go faster than six miles per hour and obviate jerking

and swaying, and that the whipping would increase with the speed of the train. He further testified that the rails at the curve in question had wide joints, were of different sizes, one having a five eights inch lip, that the east rail of this curve had been placed in reverse because it had been worn out on the east side.

John C. Casey, the concluding witness called by the plaintiff, identified some photographs that he had taken at the scene of the accident.

On behalf of the defendant, the entire crew, namely, Kroeck, Hollenbeck, Haney and Dockins testified that the train entered the curve without any more than the usual swaying and at a rate of speed varying from six to ten miles per hour.

Carl Kroeck further testified that the plaintiff was riding on the footboard to his right; and that, as the tender approached the place of the accident, the plaintiff had hold of the hand railing with his right hand, and bent down as if to be looking underneath the tender, and fell in the middle of the track. On cross examination he testified that a train going over this curve at a speed of eight miles per hour, there would be a whipping, and such would increase with the speed of the train, and that the maximum speed of safety was ten to twelve miles per hour. This witness had previously signed a statement and given it to an investigator for the plaintiff's lawyer, wherein he said that the tracks in the curve are rough, that the east rails were second handed and placed in reverse, that the joints in the curve were bad and out of line. In the statement he also said that the train at the time of the accident was going ten to twelve miles per hour.

Jerome Hollenbeck, defendant's switchman testified that he had gotten off of the tender before the accident, and heard someone holler, and the train stopped within a car length; that the distance between the point of the injury and the switch shanty

was 140 feet. He had also made a statement which he had given to the representatives of the Brotherhood of Railroad trainmen. He approved the signed statement to the extent that the inside rail at the curve was reversed, it having been previously used as an outside rail. Other than that he repudiated the entire statement. He said that he repudiated the statement because he was not under oath at the time it was made and because he thought it was made for insurance purposes. In the statement he said that the joints of the rail were kinked, and as the train was entering the curve it began swaying from east to west.

Several witnesses were called on behalf of the defendant including the roadmaster, yardmaster and photographer. We deem it unnecessary to detail their testimony since it throws little light on the factual issues in controversy. It is interesting to note however, that although they were in a position to know, little was said by them about the condition of the track at the place of the accident. They did make the observation that the rails used there were all one hundred pounds, and that there were no seventy five or eighty pound ones, as testified by Osborne.

The photographs introduced in evidence by the plaintiff sustains his contention that the rails at the point of the accident were in a state of disrepair.

Defendant contends that there was no actionable negligence proven on the part of the defendant and that the plaintiff's sole negligence caused his injury, and that the lower court erred in not having directed a verdict in its behalf. With this contention we cannot agree. If there was any evidence in the case tending to establish plaintiff's complaint, the question of negligence on the part of the defendant becomes one of fact for the jury. We are also of the opinion that this verdict should not be disturbed on the ground that it is against the manifest weight of the evidence.

Defendant argues that four witnesses in their employ state that the train was not going in excess of ten miles per hour. Let us bear in mind, however, that two of these witnesses who were in a superior position to know the true facts had made written statements much at a variance with what they had to say at the trial. No doubt this affected very materially the credence the jury placed on their testimony. Hollenbeck continually insisted that he repudiated the statement, although he admitted he had signed it and that over his signature were the words "read and approved". He further said that he repudiated it because he was not under oath and he thought it was being made for other purposes. It is difficult to argue that fault can be found with the jury for having little faith in the testimony of a witness who so conducts himself.

Defendant further contends with respect to the speed of the train at the time of the occurrence that the train in question was required to stop to negotiate a switch which was some eight or nine car lengths further ahead of where the accident occurred, and that it, of necessity, had to be travelling at a slow rate of speed to accomplish this; and it is further argued by them that the train crew all testified that the train was stopped after receiving the "watch out" signal within the distance of two car lengths, and that this could not have been done if the train were proceeding as rapidly as the plaintiff would have one believe.

Plaintiff, replying thereto, has the following to say: first, that Kroeck, who was standing beside the plaintiff, testified that the train stopped after giving the emergency signal within one car length, and that it was proceeding at that time at the rate of ten to twelve miles per hour, and if it became necessary for the train to stop for the switch, it certainly could be halted within two or three car lengths even though it was going at the rate of fourteen to sixteen miles per hour. Secondly,

that Kroeck testified that plaintiff was leaning forward as if to be looking for his cap and fell head first into the middle of the track, but the plaintiff contends that the accident just could not have happened that way - that the plaintiff could not have extricated himself so quickly that he could place all of his body except his limbs east of the rails before the train reached him. He further contends that he must have been thrown by the lurching and swaying of the train to have fallen to the outside of the tracks as much as he did. Thirdly, Kroeck and Hollenbeck both made written statements previous to the trial at variance with the above statements, and admitted that the train went into the curve swaying and swerving. Fourthly, that Hollenbeck, particularly, demonstrated on the witness stand that he was quite partisan, almost to the point of dishonesty.

From the foregoing conflicting contentions, it can easily be seen that varying and yet reasonable conclusions could be reached by a jury in considering such proof and arguments presented to them. It is not within the province of this Court to weigh conflicting inferences and to speculate and try to determine issues of fact. The inquiry here is not whether the jury under the evidence, is right or wrong, but whether the verdict of a jury had support in the evidence.

If a Court were to substitute its thinking for that of the jury, no lawyer could tell the law of a particular case until the impression of the last judge as to its facts had been obtained. When such is the case, precedents lose their value, uncertainty is fostered and nothing beneficial is added to the administration of justice.

The jury saw and heard the witnesses and was in a better position to appraise the value of their testimony than this court. If the jury believed the statements made by Kroeck and Hollenbeck prior to the trial in addition to the testimony of the plaintiff,

they would have abundant support for their conclusion that the defendant was negligent as charged and that such was the sole cause of the plaintiff's injuries.

The jury having found by its verdict that defendant was negligent in the manner in which it maintained its roadbed and tracks and also in the manner in which it propelled its train at the time of the accident, the plaintiff's right to recovery is supported by the following authorities, Western & Atlantic R. Co. v. Hughes, 278 U. S. 496 49S.Ct.231, 73 L. Ed. 473; Mulstay v. Des Moines Union R. Co., 195 Iowa 913, 192 N. W. 439; Miller v. Schaaf (Mo. Sup.) 228 S. W. 488; Burton v. Wabash R. Co. (Mo. Sup.) 236 S. W. 338; Harrison v. St. Louis S. F. R. Co., 339 Mo. 321, 99 S. W. 2d 841; Wilson v. Chicago Heights T. T. R. Co., 212 Ill. App. 271; Chicago G. T. W. R. Co. v. Kannare, 115 Ill. App. 132.

Defendant complains that the court erred in admitting the testimony of the two expert witnesses, Osborne and Walker who testified on behalf of the plaintiff. They argue that they were not sufficiently qualified to testify as experts ... The record shows that Osborne was a consulting engineer, receiving his education from Washington University and in the Case School of Applied Science. He applied his scientific knowledge and skill with various companies and in particular with the American Car and Foundry Company for twenty years as its chief engineer. He left the employ of that company in 1926 after which he became consulting engineer for various mechanical concerns in St. Louis, Missouri. While with the American Car and Foundry Co. he had extensive experience in supervising and laying tracks in the companies' shops and yards, and as an engineer has made a study of railroad tracks and curves, and the effect of misaligned tracks upon the movement of trains. Whether a witness is qualified to testify as an expert is a question of fact for the trial judge and can only be

challenged when there has been an abuse of discretion (Bonato v. Peabody Coal, 243 Ill. 422.) The testimony of this same witness was attacked in the case of Werner v. Illinois Central R. R. Co. 309 Ill. App. page 304, but the court there held that the trial court did not abuse his discretion in permitting him to testify. A fortiori the court did not err in the instant case.

Similarly we hold that Walker was well qualified to testify, and the court did not err in admitting his testimony. True it appears that he has a law suit pending against another railroad, and employs the same attorney who appears for the plaintiff in this case but those are matters that may affect his credibility or interest, but certainly not his competency.

Another contention made by the defendant is that the Court erred in refusing its offer of proof that Plaintiff was receiving a pension of \$79.00 per month under the Railroad Retirement Act. Defendant did not confine its offer to what they had actually contributed to this fund for the benefit of the Plaintiff. Both parties hereto rely upon the case of Hetrick v. Reading Company, 39 Fed. Supplement, page 22. An analysis of the decision reveals very clearly that the Defendant contention is without merit.

Defendant also urges that the verdict is excessive. When we consider that the Plaintiff is now permanently and totally disabled - he had been a railroader for 36 years - he was equipped by training and education to do nothing else - he had a life's expectancy of about 16 years; consequently, there is a proven loss of between \$35,000 and \$40,000; he was confined to the hospital for five months - during this time he suffered pain and no doubt will suffer some discomfort in the future. The figure which the jury agreed upon, namely, \$45,000. does not seem to be excessive, when considered in the light of the following authorities - Gourley vs. C. U. E. I. R. R., 295 Ill. App. 160; Taylor v.

Atchison T. & S. F. R. Co., 292 Ill. App. 457; Steirwalt v. Chicago & E. I. R. Co., 153 N. E. 807; Toledo C. & O. R. vs. Miller, 108 Ohio St., 140 N. E. 617; Herb v. Pitcairn, 306 Ill. App. 583; Taylor vs. Southern R. Co. 259 Ill. App. 271; Kurn v. Stanfield, 8 Cir. 111 F. 2d 469.

It appears, therefore, that this defendant had a fair trial and that there was no error committed that would justify a reversal of the judgment entered by the Trial Court.

JUDGMENT AFFIRMED.

FILED

NOV 25 1942

David J. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

42286

3161A. 671¹

HYMAN TUCKER, as Administrator of the
Estate of Samuel I. Tucker, De-
ceased,

Appellee,

v.

LOUIS TUCKER,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE
COURT.

Samuel I. Tucker died on August 16, 1940 and on August 19, 1940 Hyman Tucker became administrator of the estate. On October 6, 1941 a statement of claim in the name of the administrator was filed in the Municipal Court of Chicago against Louis Tucker. Hyman Tucker and the defendant are brothers. In an amended statement of claim filed in the name of the administrator on November 12, 1941 plaintiff alleged that the defendant was indebted to him in the sum of \$1,245.60, in accordance with a book account, an itemized statement of which was attached. Neither the original nor the amended statement of claim was signed by the plaintiff. It was signed by "Philip A. Shapiro, Attorney for plaintiff," and the affidavits were made by Sylvia M. Wolf. On December 20, 1941 defendant filed his answer. He denied that he was indebted to the plaintiff in any sum whatsoever; pleaded the five year Statute of Limitations as to an item of \$645.60; and alleged that all moneys received by him (defendant) were fully paid, satisfied and discharged. The case was tried before the court without a jury and resulted in a finding and judgment for the plaintiff in the sum of \$1,245.60. Within thirty days from the time the judgment was entered, defendant filed a written motion for a new trial, supported by an affidavit by Hyman Tucker. This affidavit reads:

HYMAN TUCKER, as Administrator of the
Estate of Samuel I. Tucker, De-
ceased,

Appellee,

LOUIS TUCKER,

Appellant.

THE ILLINOIS
MUNICIPAL COURT
OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE

COURT.

Samuel I. Tucker died on August 16, 1940 and on August 19, 1940 Hyman Tucker became administrator of the estate. On October 6, 1941 a statement of claim in the name of the administrator was filed in the Municipal Court of Chicago against Louis Tucker. Hyman Tucker and the defendant are brothers. In an amended statement of claim filed in the name of the administrator on November 12, 1941 plaintiff alleged that the defendant was indebted to him in the sum of \$1,245.80, in accordance with a book account, an itemized statement of which was attached. Neither the original nor the amended statement of claim was signed by the plaintiff. It was signed by "William A. Shapiro, Attorney for plaintiff," and the affidavits were made by Sylvia M. Wolf. On December 30, 1941 defendant filed his answer. He denied that he was indebted to the plaintiff in any sum whatsoever; pleaded the five year Statute of Limitations as to an item of \$45.80; and alleged that all moneys received from him (defendant) were fully paid, settled and discharged. The case was tried before the court without a jury and resulted in a finding and judgment for the plaintiff in the sum of \$1,245.80. Within thirty days from the time the judgment was entered, defendant filed a written motion for a new trial, supported by an affidavit by Hyman Tucker. This affidavit reads:

"Hyman Tucker, being first duly sworn on oath deposes and says that he was duly appointed, has qualified and is now acting as administrator of the estate of Samuel I. Tucker, deceased, which estate is now pending in the Probate Court of Cook County, Illinois and is entitled 'In the Matter of the Estate of Samuel I. Tucker, Deceased, Docket #396 Page #407, File No. 40P 5882.'

"Affiant further states that as such administrator he was made a party plaintiff in a certain suit now pending in the Municipal Court of Chicago, entitled 'Hyman Tucker, as Administrator of the Estate of Samuel I. Tucker, Deceased, Plaintiff, vs. Louis Tucker, Defendant, No. 2788295.' Affiant further states that the defendant, Louis Tucker, is his brother.

"Affiant further states that he was never consulted with reference to the filing of said suit and had no knowledge of the institution of said suit and the pendency thereof until he was informed by the defendant that a summons was served on him in connection therewith. That thereafter he examined the statement of claim and amended statement of claim filed in said cause, which statement of claim and amended statement of claim disclose an affidavit forming a part thereof, executed by one Sylvia M. Wolf, who states among other things that she is the agent of the plaintiff in said cause and as such has full knowledge of the facts relating to the statement of claim and to the amended statement of claim, respectively. Affiant states that he does not know, nor is he acquainted with said Sylvia M. Wolf and further states that he never appointed the said Sylvia M. Wolf as his agent in this or any other matter.

"Affiant further states that he was employed by the said Samuel I. Tucker, now deceased, for a great number of years in the capacity of assisting him in the management, operation and conduct of his said business and in connection with said employment had full and complete access to the books and records of the business of the said Samuel I. Tucker. Affiant further states that he knows that the books of account of the said Samuel I. Tucker, deceased, disclose a balance due from Louis Tucker to the estate of Samuel I. Tucker, deceased, but this affiant knows of his own knowledge that the said Louis Tucker was not indebted to the said Samuel I. Tucker at the time of his death and is not now indebted to the estate of the said Samuel I. Tucker, deceased.

"Affiant further states that he is ready, able and willing to appear at any hearing that may be had in connection with said cause and submit himself to an examination by court or counsel touching upon the matters herein contained and will testify as to the statements made in the within affidavit, the source of his knowledge of the facts herein set forth and such other matters as to the court may seem just and proper in connection with this affidavit."

The court overruled the motion for a new trial. Defendant appeals from the judgment.

Hyman Tucker was called as a witness on behalf of plaintiff.

He was asked whether he was the plaintiff and answered in the affirmative. He was not cross-examined. Sol Miller, a witness called by plaintiff, testified that he had been an accountant for over twenty years; that he knew Samuel I. Tucker during his lifetime; that for a number of years he handled the books of account of Samuel I. Tucker; that certain books exhibited to him were the books of account of Samuel I. Tucker; that a

"Hyman Tucker, being first duly sworn on oath deposes and says that he was duly appointed, has qualified and is now acting as administrator of the estate of Samuel I. Tucker, deceased, which estate is now pending in the Probate Court of Cook County, Illinois and is entitled 'In the Matter of the Estate of Samuel I. Tucker, Deceased,' Docket #398 Page #407, File No. 40P 2887."

"Affiant further states that as such administrator he was a party plaintiff in a certain suit now pending in the Circuit Court of Chicago, entitled 'Hyman Tucker, as Administrator of the Estate of Samuel I. Tucker, Deceased, Plaintiff, vs. Louis Tucker, Defendant, No. 278823.' Affiant further states that the defendant, Louis Tucker, is his brother."

"Affiant further states that he was never consulted with reference to the filing of said suit and had no knowledge of the institution of said suit and the pendency thereof until he was informed by the defendant that a summons was served on him in connection therewith. That thereafter he examined the statement of claim and amended statement of claim filed in said cause, which statement of claim and amended statement of claim disclose an affidavit forming a part thereof, executed by one Sylvia M. Wolf, who states among other things that she is the agent of the plaintiff in said cause and as such has full knowledge of the facts relating to the statement of claim and to the amended statement of claim, respectively. Affiant states that he does not know, nor is he acquainted with said Sylvia M. Wolf and further states that he never appointed the said Sylvia M. Wolf as his agent in this or any other matter."

"Affiant further states that he was employed by the said Samuel I. Tucker, now deceased, for a great number of years in the capacity of assisting him in the management, operation and conduct of his said business and in connection with said employment had full and complete access to the books and records of the business of the said Samuel I. Tucker. Affiant further states that he knows that the books and account of the said Samuel I. Tucker, deceased, disclose a balance due from Louis Tucker to the estate of Samuel I. Tucker, deceased, but that affiant knows of his own knowledge that the said Louis Tucker was not indebted to the said Samuel I. Tucker at the time of his death and is not now indebted to the estate of the said Samuel I. Tucker, deceased. Affiant further states that he is ready, able and willing to appear at any hearing that may be had in connection with said cause and submit himself to an examination by court or counsel touching upon the matters herein contained and will testify as to the statements made in the within affidavit, the source of his knowledge of the facts herein set forth and such other matters as to the court may seem just and proper in connection with this affidavit."

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Hyman Tucker was called as a witness on behalf of plaintiff. He was asked whether he was the plaintiff and answered in the affirmative. He was not cross-examined. Vol Miller, a witness called by plaintiff, testified that he had been an accountant for over twenty years; that he knew Samuel I. Tucker during his lifetime; that for a number of years he handled the books of account of Samuel I. Tucker; that certain books exhibited to him were the books of account of Samuel I. Tucker; that

ledger shown to him contained the account of Louis Tucker; that the entries therein were made by witness; that all entries were made by witness in due course of business, were true and correct, were made from the cash book, and that the check stubs and entries were made under the direction of Samuel I. Tucker. The entries in the account commence with January 1, 1933, showing a balance brought forward of \$399.37. During 1933 various items are shown as debits and during the same period other items are shown as credits. At the end of the year the account was balanced. It purported to show that on December 31, 1933 the defendant owed \$714.10. On January 1, 1934 the item of \$714.10 was carried forward as a balance. During 1934 the book shows certain debits and credits. On December 31, 1934 the books showed a balance of \$645.60. The latter item was carried forward as a balance on January 1, 1935. In 1935 the account shows various debits and credits. Each item in the debit column is preceded by the number of the check drawn and opposite the number of the check appears a letter. Apparently, when the item was paid the same key letter was placed opposite the date of payment. The book shows that on December 31, 1935 there was a balance of \$795.60. This was carried forward as a balance on January 21, 1936. According to the books, on December 31, 1936 there was a balance of \$2,995.60. This was carried forward. On December 31, 1937 there was a balance of \$1,645.60. This was carried forward on January 1, 1938 and on that date there was a balance of \$1,420.60 which was carried forward on January 1, 1939. The book shows that on December 31, 1939 there was a balance of \$1,245.60. The witness testified that each item shown on the debit side of the account was paid as shown on the credit side, except the balance of \$1,245.60. The books of account were received in evidence over objection of the defendant. The defendant was called as a witness on behalf of himself. In answer to the question as to whether he was indebted to the estate of Samuel I. Tucker, he answered in the negative. There-

ledger shown to him contained the account of Louis Tucker; that the entries therein were made by witness; that all entries were made by witness in due course of business, were true and correct, were made from the cash book, and that the check stubs and entries were made under the direction of Samuel I. Tucker. The entries in the account commenced with January 1, 1933, showing a balance brought forward of \$598.87. During 1933 various items are shown as debits and during the same period other items are shown as credits. At the end of the year the account was balanced. It purported to show that on December 31, 1933 the defendant owed \$714.10. On January 1, 1934 the item of \$714.10 was carried forward as a balance. During 1934 the book shows certain debits and credits. On December 31, 1934 the books showed a balance of \$645.60. The latter item was carried forward as a balance on January 1, 1935. In 1935 the account shows various debits and credits. Each item in the debit column is preceded by the number of the check drawn and opposite the number of the check appears a letter. Apparently, when the item was paid the same key letter was placed opposite the date of payment. The book shows that on December 31, 1935 there was a balance of \$595.60. This was carried forward as a balance on January 1, 1936. According to the books, on December 31, 1936 there was a balance of \$2,925.60. This was carried forward. On December 31, 1937 there was a balance of \$1,645.60. This was carried forward on January 1, 1938 and on that date there was a balance of \$1,420.60 which was carried forward on January 1, 1939. The book shows that on December 31, 1939 there was a balance of \$1,245.60. The witness testified that each item shown on the debit side of the account was paid as shown on the credit side, except the balance of \$1,245.60. The books of account were received in evidence over objection of the defendant. The defendant was called as a witness on behalf of himself. In answer to the question as to whether he was indebted to the estate of Samuel I. Tucker, he answered in the negative. There-

upon, counsel for the plaintiff objected to the testimony of the defendant because the plaintiff was suing as an administrator. As to the action of the court on this motion, the record reads as follows:

"The Court to the witness: Have you any documentary evidence to show that you do not owe any money? Mr. Blair: No. The Court sustained the objection of the plaintiff and further stated that he will not allow any testimony in behalf of the defendant except documentary evidence, as this suit is brought by an administrator and the testimony of witnesses is not admissible unless supported by documentary evidence. To which ruling the defendant excepted."

From the statement of facts it will be seen that the plaintiff relied on a book account. He cites Section 3, Chapter 51, Illinois Revised Statutes 1941, reading:

"Where in any civil action, suit or proceeding, the claim of defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause."

Defendant contends that entries for money loaned are not alone sufficient to make out a case for plaintiff. This court, speaking through Mr. Justice O'Connor in In re Estate of James Edwin Martine, 233 Ill. App. 94, said (96):

"Claimant contends that the court erred in refusing to admit the book of account in evidence, and it is contended it is admissible by virtue of Par. 3, chap. 51, Cahill's Statutes, which provides that in any civil action, suit or proceeding, where the claim is founded on a book account, any party or interested person may testify to his account book and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just. This statute has been construed a number of times by the Supreme Court and by this court and it has been uniformly held that entries in a book of account for money loaned are not admissible. Boyer v. Sweet, 3 Scam. (Ill.) 120; Ruggles v. Gatten, 50 Ill. 412; House v. Beak, 141 Ill. 290; Schwarze v. Roessler, 40 Ill. App. 474; Rothschild v. Sessell, 103 Ill. App. 274; MacKenzie v. Barrett, 148 Ill. App. 414.

"In holding that books of account were properly admitted in certain cases, Justice Breese said in the Boyer case (p. 122): 'This rule would not apply to an account for money lent, as that is not usually the subject matter of account, notes being generally taken, nor to an account containing a single charge only, as that would show no regular dealings between the parties.'

"In the Ruggles case, it was said (p. 416): 'It remains to determine, whether appellee's books of account were properly admitted

upon, counsel for the plaintiff objected to the testimony of the defendant and because the plaintiff was suing as an administrator. As to the action of the court on this motion, the record reads as follows:

"The Court to the witness: Have you any documentary evidence to show that you do not owe any money? Mr. Miller: No. The Court sustained the objection of the plaintiff and further stated that he will not allow any testimony in behalf of the defendant except documentary evidence, as this suit is brought by an administrator and the testimony of witnesses is not admissible unless supported by documentary evidence to which ruling the defendant excepted."

From the statement of facts it will be seen that the plaintiff relied on a book account. He cites Section 3, Chapter 31, Illinois Revised Statutes 1941, reading:

"Where in any civil action, suit or proceeding, the claim of defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the case."

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"In the Rumple case, it was said (p. 412): 'It remains to determine, whether appellee's books of account were properly admitted

in evidence. In the case of Boyer v. Sweet, 3 Scam. 122, it was held, that in case of open accounts composed of many items, where the entries are made by the creditor himself, he having no clerk, the book of original entries is admissible, upon proof being made by persons who had dealt with him and had settled by the same book, that it is fair and correct, and that some of the articles charged were delivered at or about the time the entries purport to have been made, and that the entries are in the handwriting of the party producing the books. But it was held that the rule would not apply to an account for money lent, or for an account of but a single item. The rule there announced has been repeatedly recognized by subsequent decisions of this court, and without any modification.'

"In the House case, it was held that par. 3, chap. 51, Cahill's Statutes, which was passed in 1867, adds to and enlarges but does not repeal the rule at common law; that it enlarges the common law in that it permits an interested party to testify.

"In the Schwarze case, it was said that the law permitting books of account to be offered in evidence did not apply to cash items. And in the Rothschild case, the court said (p. 283): 'The account books of the firm alone were not sufficient to prove that the entries therein of cash or check charged to the decedent by the firm, were that much money loaned to him by them, for the reason that the usual probative force of accounts kept in books in the usual course of dealings between parties as regards transactions of merchandise and the like "do not apply to an account for money lent, as that is not usually the subject-matter of an account, notes being generally taken."' Citing several authorities.

"In the MacKenzie case, where it was sought to prove by the claimant that he had loaned the decedent in her lifetime certain money by notations on his check stub, that they as well as the canceled checks were admissible, Mr. Presiding Justice Adams said (p. 417): 'Such entries of charges for money loaned would not be evidence.' Citing a number of cases. See also to the same effect Smith v. Rentz, 131 N. Y. 176 and Inslee v. Executor of Prall, 23 N.J.L. 457.

"Even if it be conceded that plaintiff's pad might be termed a book of account, it would not be admissible to prove that he had loaned \$400 to the deceased in his lifetime. Therefore, the ruling in excluding it was proper."

Plaintiff argues that in the case at bar the entries show that the transactions were "mostly sales of merchandise and some transactions by checks." The entries show some transactions by checks, but do not show any sales of merchandise. From the doctrine announced in Boyer v. Sweet, 3 Scam 120, and followed in the Martine case, we are of the opinion that the books of account on which the plaintiff relies, are not sufficient to make out a case. The entries purport to be for money lent

Defendant also contends that the action is barred as to an item of \$645.60 because it was not brought within five years. The court rejected this defense on the ground that there was a running account

In evidence. In the case of Boyer v. Boyer, 3 Conn. 122, it was held that in case of open accounts composed of many items, where the entries are made by the creditor himself, he having no clerk, the book of original entries is admissible, upon proof being made by persons who had dealt with him and had settled by the same book, that it is in and correct, and that some of the articles charged were delivered at or about the time the entries purport to have been made, and that the entries are in the handwriting of the party producing the books. But it was held that the rule would not apply to an account for money lent, for an account of but a single item. The rule there announced has been repeatedly recognized by subsequent decisions of this court, and without any modification.

"In the Houss case, it was held that par. 2, chap. 51, Civil Statutes, which was passed in 1837, adds to and enlarges but does not repeal the rule at common law; that it enlarges the common law in that it permits an interested party to testify.

"In the Behnke case, it was said that the law permitting books of account to be offered in evidence did not apply to cash items. And in the Bohach case, the court said (p. 283): 'The account books of the firm alone were not sufficient to prove that the entries thereof of cash or check charged to the decedent by the firm, were that much money loaned to him by them, for the reason that the usual practice of force of accounts kept in books in the usual course of dealing between parties as regards transactions of merchandise and the like "do not apply to an account for money lent, as that is not usually the subject matter of an account, notes being generally taken." ' Citing several authorities.

"In the MacKenzie case, where it was sought to prove by the claimant that he had loaned the decedent in her lifetime certain money by notations on his check stub, that they as well as the canceled checks were admissible, Mr. President Justice Adams said (p. 417): 'And entries of charges for money loaned would not be evidence.' Citing a number of cases. See also to the same effect Wright v. Wright, 103 N. H. 176 and Ingles v. Executor of Hall, 22 N. H. 457.

"When it is conceded that plaintiff's book might be termed a book of account, it would not be admissible to prove that he had loaned \$400 to the decedent in his lifetime. Therefore, the ruling excluding it was proper."

Plaintiff argues that in the case at bar the entries show that the transactions were "mostly sales of merchandise and some transactions by checks." The entries show some transactions by checks, but do not show any sales of merchandise. From the doctrine announced in Boyer v. Sweet, 3 Conn. 120, and followed in the Martine case, we are of the opinion that the books of account on which the plaintiff relies, are sufficient to make out a case. The entries purport to be for money lent. Defendant also contends that the action is barred as to an item of \$48.00 because it was not brought within five years. The court rejected this defense on the ground that there was a running account

between the parties. It is the law of this State that to revive the items of an open account which are barred by the statute by a payment in part or part payment on account, it is necessary that it should appear that the payment was made on those items, or that the debtor, having full knowledge of the charges in the account to which the statute was a bar, made the payment recognizing its validity. In the case of Miller v. Cinnamon, 168 Ill. 447, the court said (456):

"A part payment of a debt will take it out of the statute, whether the payment is made in money or by goods and chattels; 'it must, however, be certain, that the payment is made only as part of a larger debt; for, in the absence of conclusive testimony, it will not be deemed an admission of any more debt than it pays.' (3 Parsons on Contracts, pp. 74, 75.) The mere fact that a debtor, who owes an account, pays a sum not more than sufficient to cover items of recent origin, without proof of an intention that such payment is to apply to items of older date barred by the Statute of Limitations, is not sufficient of itself to relieve such barred items from the operation of the statute. * * * The main ground upon which the rule rests, that items within the period of limitation draw after them items beyond that period, is that every new item and credit in an account given by one party to the other is an admission that there are some unsettled accounts between them. In other words, the items within the five years are regarded, in case of a mutual account as 'an admission of an unsettled account, and equivalent to evidence of a new promise, which takes all the other items out of the statute.' (7 Wait's Actions and Defenses, 266; Angell on Limitations, sec. 144.) * * * In ordinary cases of mutual dealings the obligation is to pay the balance of the general account, but it must appear that each new item of credit is paid by the defendant with a view to lessen such balance; otherwise it is not equivalent to a new promise to pay what remains."

It will be observed that commencing with January, 1935 each of the items both on the credit and debit side bears a key letter. When payment was made in most instances the key letter appeared opposite the amount paid, and corresponded with the key letter on the debit side of the ledger. An examination of the account shows that the item of \$645.60, shown under date of December 31, 1934, was undisturbed and the account does not show that any payment was made on this balance, or that this account was in any way reduced. On the contrary, the account shows an increase of the amount claimed to be due thereon. We are of the opinion that the court should have sustained defendant's contention that the item of \$645.60 was barred by the Statute of Limitations.

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Defendant further maintains that the court erred in ruling that he would be limited to the introduction of documentary evidence. The record before us quotes the trial judge as saying that he would not allow any testimony on behalf of the defendant except documentary evidence, "as this suit is brought by an administrator and the testimony of witnesses is not admissible unless supported by documentary evidence." Section 2, Chapter 51, Illinois Revised Statutes, 1941, provides that no party to any civil action, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of Section 1, when any adverse party sues or defends as an executor, administrator etc., unless when called as a witness by such adverse party so suing or defending, and except in certain other cases. The court properly sustained the objection to the testimony of the defendant. The court was in error, however, in holding that the testimony of witnesses other than the defendant was not admissible unless supported by documentary evidence. It does not appear that this ruling harmed the defendant, as the record does not show any offer by him as to what testimony would be given by any such witnesses.

The record of this case presents an anomalous situation. On the motion for a new trial the defendant presented an affidavit sworn to by the plaintiff. In this affidavit defendant deposes that he was not consulted with reference to the filing of the suit, that he had no knowledge thereof until he was informed by the defendant; that thereupon he examined the statement of claim and observed that one Sylvia M. Wolf swore she was his agent and that she had full knowledge of the facts; that he did not know Sylvia M. Wolf and did not appoint her his agent; that he was employed by Samuel I. Tucker for a great number of years in the capacity of assisting him in the management, operation and conduct of his business; that he knows that the books of the deceased disclose a balance due from Louis Tucker; that he knows of his own know-

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ledge that Louis Tucker was not indebted to Samuel I. Tucker at the time of his death; and that he was ready to appear and submit to an examination as to the statements made in the affidavit and as to the source of his knowledge. It thus appears that the attorney representing the plaintiff is prosecuting the claim contrary to the wishes of his client. The client states that he did not authorize Sylvia M. Wolf to sign the statement of claim in his behalf and that he did not authorize the bringing of the action. The record shows that at the time the case was tried, the attorney for plaintiff placed him on the stand and asked him whether he was the plaintiff. He was not asked any other questions by either the attorney for the plaintiff or the attorney for the defendant. Hyman Tucker was appointed administrator of the estate of Samuel I. Tucker by the Probate Court of Cook County and is responsible to that court for the faithful performance of his duties. The presumption is that he is performing his duties. Section 276 of the Probate Act (Sec. 430, Ch. 3, Ill. Rev. Stat. 1941) provides for the removal of an executor or administrator when he wastes or mismanages the estate, or conducts himself in such a manner as to endanger the sureties on his bond. If the administrator is wrongfully refusing to prosecute the alleged claim against his brother, Louis Tucker, any person interested would have a right to petition the Probate Court for his removal. The attorney cannot prosecute a claim contrary to the wishes of his client.

Because of the views expressed, the judgment of the Municipal Court of Chicago is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, J, and KILEY, J, CONCUR.

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 time of his death; and that he was ready to appear and submit to an
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 authorize the bringing of the action. The record shows that at the
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 and is responsible to that court for the faithful performance of his
 duties. The presumption is that he is performing his duties. Section
 276 of the Probate Act (Sec. 430, Ch. 3, Ill. Rev. Stat. 1941) provides
 for the removal of an executor or administrator when he wastes or
 manages the estate, or conducts himself in such a manner as to en-
 danger the assets on his bond. If the administrator is wrongfully
 refusing to prosecute the alleged claim against his brother, Louis
 Tucker, any person interested would have a right to petition the Pro-
 bate Court for his removal. The attorney cannot prosecute a claim con-
 trary to the wishes of his client.

Because of the views expressed, the judgment of the United
 Court of Chicago is reversed and the cause remanded for further pro-
 ceedings not inconsistent with this opinion.

REVEREND AND HONORABLE THE COURT.

HABEL, J., and KILLEY, J., CONCUR.

42190

ETHEL M. MACLASKEY,

Appellee,

v.

WILLIAM KURZ, Defendant,

and

NEWELL MECARTNEY, Respondent.

Appeal of WILLIAM KURZ and NEWELL
MECARTNEY,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff, Ethel M. MacLaskey, to recover from the defendant, William Kurz, \$207.70 being a balance due for services rendered by the plaintiff as a court reporter taking stenographic notes of court proceedings and making typewritten transcripts of the same in the City of Chicago, County of Cook and State of Illinois.

Plaintiff alleges that on or about the 28th day of November, 1937, the defendant William Kurz was the defendant in a case then pending in the Superior Court of Cook County, Illinois entitled Phillipine Kurz v. William Kurz, No. 3759724; that on or about the 28th day of November, 1937 the defendant engaged and employed plaintiff to take stenographic notes of the proceedings in said cause of Phillipine Kurz v. William Kurz, No. 37 59724 in the Superior Court of Cook County and make typewritten transcripts of the same and to render services in said cause as a stenographer and court reporter, and that the defendant William Kurz then and there agreed and promised plaintiff to pay her the fair, usual and customary charges for the services to be rendered by the plaintiff.

ETHEL M. MACLEARY,

Appellee,

v.

WILLIAM KURT, Defendant,

and

NEWELL MACLEARY, Respondent.

Appeal of WILLIAM KURT and NEWELL

MACLEARY,

Appellants.

MR. JUSTICE HANCOCK DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff, Ethel M. Macleary,

to recover from the defendant, William Kurt, \$20.70 being a

balance due for services rendered by the plaintiff as a court reporter

taking stenographic notes of court proceedings and making typewritten

transcripts of the same in the City of Chicago, County of Cook and

State of Illinois.

Plaintiff alleges that on or about the 22nd day of November,

1937, the defendant William Kurt was the defendant in a case then

pending in the Superior Court of Cook County, Illinois entitled

Phillipine Kurt v. William Kurt, No. 378734; that on or about the 22nd

day of November, 1937 the defendant engaged and employed plaintiff

to take stenographic notes of the proceedings in said case of

Phillipine Kurt v. William Kurt, No. 378734 in the Superior Court

of Cook County and make typewritten transcripts of the same and to

render services in said case as a stenographer and court reporter,

and that the defendant William Kurt then and there agreed and

promised plaintiff to pay her the said, usual and customary charges

for the services to be rendered by the plaintiff.

To this statement the appearance of this defendant was entered in which the defendant states that he is not informed as to the facts stated in the statement of claim and therefore denies the same. Wherefore upon the statement as set forth the defendant asked that the cause be dismissed with the plaintiff's costs.

Subsequently the plaintiff filed a reply to the defendant's defense and she denies the allegation contained in the defendant's defense and denies that the defendant either advanced to the plaintiff or to Harold O. Mulks the sum of \$1000 or any other sum.

It appears in the record that the court ordered that leave be granted Harold O. Mulks to appear as additional counsel for the plaintiff. Subsequently there was an amended reply of the plaintiff to the defendant's defense, in which she denies that the defendant advanced to the plaintiff alone or together with Harold O. Mulks, the sum of \$1000 or any other sum, and denies that the defendant was ever induced to invest any sum of money with the plaintiff or with the said Harold O. Mulks; and denies that the defendant ever did invest with or turn over to the plaintiff the sum of \$1,000.

It further appears from the record in this case that on the 16th of January, 1941, the plaintiff filed an affidavit in support of a motion for a summary judgment, in which she states that she is the plaintiff in the action and that the suit is for the balance due her from the defendant for services rendered as a court reporter; that she has been engaged in the business of court reporting more than 25 years; that the charge made by court reporters in the City of Chicago is \$3 per hour for taking stenographic notes of court proceedings or proceedings before masters in chancery, and the further charge of 50 cents per page for making transcripts of proceedings, and the further charge of 15 cents per page for making additional typewritten carbon copies of the transcript; that the affiant known William Kurz the defendant in this case and has known

To this statement the answer of this defendant was entered in which the defendant states that he is not informed as to the facts stated in the statement of claim and therefore denies the same. Wherefore upon the statement as set forth the defendant asked that the cause be dismissed with the plaintiff's costs.

Subsequently the plaintiff filed a reply to the defendant's defense and she denies the allegation contained in the plaintiff's defense and denies that the defendant either advanced to the plaintiff or to Harold O. Minks the sum of \$1000 or any other sum.

It appears in the record that the court ordered that leave be granted Harold O. Minks to appear as additional counsel for the plaintiff. Subsequently there was an amended reply of the plaintiff to the defendant's defense, in which she denies that the defendant advanced to the plaintiff alone or together with Harold O. Minks, the sum of \$1000 or any other sum, and denies that the defendant was ever induced to invest any sum of money with the plaintiff or with the said Harold O. Minks; and denies that the defendant ever did invest with or turn over to the plaintiff the sum of \$1,000.

It further appears from the record in this case that on the 18th of January, 1941, the plaintiff filed an affidavit in support of a motion for a summary judgment, in which she states that she is the plaintiff in the action and that the suit is for the balance due her from the defendant for services rendered as a court reporter; that she has been engaged in the business of court reporting more than 25 years; that the charges made by court reporters in the City of Chicago is 3 per hour for taking stenographic notes at court proceedings or proceedings before masters in chancery, and the further charge of 50 cents per page for making transcripts of proceedings, and the further charge of 15 cents per page for making additional typewritten copies of the transcripts; that the affiant knows William Lutz the defendant in this case and has known

him ever since about the 28th day of November, 1937; that about the 28th day of November, 1937 affiant was introduced to William Kurz by Harold O. Mulks, an attorney, at the office of this affiant; that she had a conversation with the defendant and also with Mulks in the presence of the defendant, and that said Kurz asked this affiant what affiant charged for rendering services as a court reporter, and this affiant stated to Kurz that she charged \$3 per hour for taking stenographic notes and charged 50 cents per page for making typewritten transcripts of proceedings and 15 cents per page for making carbon copies. Affiant further states in her affidavit that she expended 60½ hours in taking stenographic notes of proceedings in connection with the cause; that William Kurz was personally ^{present} at all times when affiant took notes of said proceedings, and affiant was directed by Harold O. Mulks to make a transcript and copy of the notes that she had taken; that she transcribed 392 typewritten pages of the proceedings; that the total amount earned by this affiant in accordance with the agreement with said Kurz and charged to said Kurz by this affiant for said services was \$394.20; that affiant also rendered services to Kurz in the case of Pfeil v. Kurz in which she expended 9½ hours time and that the charge for such service was \$28.50; also that affiant rendered similar services to Kurz in the case of Kurz v. Borg in the month of November, 1938 to the value of \$3.00; that the total value of services rendered by plaintiff to defendant was \$425.70 and that there has been paid to plaintiff the total of \$218.00, thus leaving a balance due to her of \$207.70; that affiant makes this affidavit for the purpose of having the facts stated in the affidavit considered as evidence in support of a motion for summary judgment against the defendant.

Subsequently the defendant Kurz propounded certain interrogatories to the plaintiff, which were answered by the plaintiff.

him ever since about the 28th day of November, 1937; that about the 28th day of November, 1937 affiant was introduced to William Kutz by Harold G. Miska, an attorney, at the office of said attorney; that she had a conversation with the defendant and also with affiant in the presence of the defendant, and that said Kutz asked affiant what affiant charged for rendering services as a court reporter and this affiant stated to Kutz that she charged \$5 per hour for taking stenographic notes and charged 50 cents per page for making typewritten transcripts of proceedings and 10 cents per page for making carbon copies. Affiant further stated in her affidavit that she expended 60 1/2 hours in taking stenographic notes of proceedings in connection with the case; that William Kutz was personally at all times when affiant took notes of said proceedings, and affiant was directed by Harold G. Miska to make a transcript and copy of the notes that she had taken; that she transcribed 322 typewritten pages of the proceedings; that the total amount earned by this affiant in accordance with the agreement with said Kutz and charged to said Kutz by this affiant for said services was \$391.50; that affiant also rendered services to Kutz in the case of Paul v. Mary in which she expended 9 1/2 hours time and that the charge for such service was \$28.50; also that affiant rendered similar services to Kutz in the case of Kutz v. Borg in the month of November, 1938 to the value of \$7.50; that the total value of services rendered by affiant to defendant was \$425.70 and that there has been paid to affiant the total of \$18.00, thus leaving a balance due to her of \$407.70; that affiant makes this affidavit for the purpose of having the notes stated in the affidavit considered as evidence in support of a motion for summary judgment against the defendant.

Subsequently the defendant was requested certain interrogatories to the plaintiff, which were answered by the plaintiff.

The plaintiff filed a further petition and charges that the defendant never filed or attempted to file anything in opposition to the motion for summary judgment prior to the 7th of May, 1941; that on the 7th of May the document which was labeled "Answer" and which bears the name of Newell Mecartney as attorney for the defendant in the above entitled cause was filed in this case.

The plaintiff charges that the filing of said document was a nullity and a fraud on the court for the reasons that the petition affirmatively showed on its face that the party making the affidavit was competent to testify and that the denominated "answer" was not signed by Mecartney and the purported verification thereto did not contain a recital that he had read the contents of the same.

It appears from this record that an ex parte judgment was entered on July 1, 1941 for the plaintiff, for the sum of \$207.70. Subsequently to this date, November 14, 1941, the defendant filed a petition to vacate the judgment entered by the court on July 1, 1941 for the amount above indicated, and in this petition the defendant stated that on May 5, 1941 this cause was by order of court continued to June 10, 1941; that the files in this cause were short in the trial court on June 10, 1941 and that no order of any kind was noted upon the half sheet or upon the docket in this cause; that on July 28, 1941 petitioner's attorney noticed for the first time the files stated a judgment was entered on July 1, 1941; that at said time there was nothing on the half sheet to indicate in any manner that this cause had been set for trial on July 1, 1941; that thereafter at some time unknown to petitioner or his attorney a notation was entered in ink above the entries of the filing of said notice and petition to the effect that on June 10, 1941 this cause had been set for trial on July 1, 1941; that the court also lacked jurisdiction in said cause because of the fact that the attorney for the plaintiff, Harold O. Mulks, was the attorney for defendant William Kurz during all of the time mentioned in the statement of claim in all of the

The plaintiff filed a further petition and answers that the defendant never filed or attempted to file anything in opposition to the motion for summary judgment prior to the 7th of May, 1941; that on the 7th of May the document which was labeled "answer" and which bears the name of Howell Macarthy as attorney for the defendant in the above entitled cause was filed in this case.

The plaintiff charges that the filing of said document was a nullity and a fraud on the court for the reasons that the petition affirmatively showed on its face that the party making the affidavit was competent to testify and that the document was "answer" was not signed by Macarthy and the purported verification thereto did not contain a recital that he had read the contents of the same.

It appears from this record that an ex parte judgment was entered on July 1, 1941 for the plaintiff, for the sum of \$207.75. Subsequently to this date, November 14, 1941, the defendant filed a petition to vacate the judgment entered by the court on July 1, 1941 for the amount above indicated, and in this petition the defendant stated that on May 8, 1941 this cause was by order of court continued to June 10, 1941; that the files in this cause were sent in the trial court on June 10, 1941 and that no order of any kind was made upon the half sheet or upon the docket in this cause; that on July 28, 1941 petitioner's attorney noticed for the first time the files stated a judgment was entered on July 1, 1941; that at said time there was nothing on the half sheet to indicate in any manner that this cause had been set for trial on July 1, 1941; that thereafter at some time unknown to petitioner or his attorney a notation was entered in ink above the entries of the filing of said notice and petition to the effect that on June 10, 1941 this cause had been set for trial on July 1, 1941; that the court also issued judgment in said cause because of the fact that the attorney for the plaintiff, Harold O. Minks, was the attorney for defendant William E. Mink during all of the time mentioned in the statement of claim in all of the

matters set forth therein, and that it is against public policy and the ethics of the profession and detrimental to bench and bar to permit an attorney to forsake his client.

To this petition of the defendant to vacate the judgment entered by the court the plaintiff filed an answer and in said answer stated that attorney Newell Mecartney was present in court on May 5, 1941 when said cause was continued to June 10, 1941; that on June 10, 1941 plaintiff and her attorney were present before the court but that neither Kurz nor Mecartney was present and the plaintiff not desiring to take a default judgment requested the court, through her attorney, to continue said cause; that the cause was then continued to July 1, 1941; that on Saturday June 27, 1941 plaintiff procured one Ewart Harris, a member of the bar of the State of Illinois, to call said Mecartney upon the telephone and to state to said Mecartney that the cause was coming up for trial on July 1, 1941 and that the plaintiff would insist upon proceeding to trial on that date, but that neither Kurz nor Mecartney appeared before the court on said date; that on July 1, 1941 plaintiff and her witnesses were present and plaintiff then proved her claim against said Kurz and a judgment was rendered in her favor.

It appears from the answer of plaintiff that Mecartney neither knew plaintiff nor Kurz at the time the plaintiff rendered services to Kurz as a court reporter but, notwithstanding that fact, said Mecartney signed and verified a false and insulting affidavit of defense in the cause and stated therein that plaintiff had swindled Kurz out of a thousand dollars; that plaintiff caused the deposition of said Mecartney to be taken; that said Mecartney then admitted he had no basis for said statement; that the plaintiff requested that a hearing be had upon said petition filed by Kurz to vacate said judgment; that Mecartney was placed under oath in open court and asked to state what basis he had for the statements made in the affidavit of defense filed by him.

permit an attorney to forsake his client.

To this petition of the defendant to vacate the judgment

entered by the court the plaintiff filed an answer and in said answer stated that attorney Newell McCarthy was present in court on July 1, 1941 when said cause was continued to June 10, 1941; that on June 10, 1941 plaintiff and her attorney were present before the court and that neither Kurt nor McCarthy was present and the plaintiff not desiring to take a default judgment requested the court, through

her attorney, to continue said cause; that the cause was then continued to July 1, 1941; that on Saturday June 27, 1941 plaintiff procured one Earl Harris, a member of the bar of the State of Illinois to call said McCarthy upon the telephone and to state to said

McCarthy that the cause was coming up for trial on July 1, 1941 and the plaintiff would insist upon proceeding to trial on that date, but that neither Kurt nor McCarthy appeared before the court on said date; that on July 1, 1941 plaintiff and her witnesses were present and plaintiff then proved her claim against said Kurt and a judgment was rendered in her favor.

It appears from the answer of plaintiff that McCarthy

neither knew plaintiff nor Kurt at the time the plaintiff rendered services to Kurt as a court reporter but, notwithstanding that fact, said McCarthy signed and verified a false and incriminating affidavit

of defense in the cause and stated therein that plaintiff had swindled Kurt out of a thousand dollars; that plaintiff demanded the deposition of said McCarthy to be taken; that said McCarthy then admitted he had no basis for said statement; that the plaintiff

requested that a hearing be had upon said petition filed by her to vacate said judgment; that McCarthy was placed under oath in open court and asked to state what basis he had for the statements made in the affidavit of defense filed by him.

The court, after due consideration, denied the motion of the defendant to vacate the judgment that was entered on July 1, 1941.

It appears that at no time did a report of the proceedings appear in the record and it must be presumed that all issues and questions of fact were properly determined by the nisi prius court. Jackson v. Bateman, 180 Ill. 359; Franklin County Bldg. Ass'n. v. Smith 260 Ill. App. 315; Tibbitts-Hewitt Grocery Co. v. Cohen, 256 Ill. App. 459; Falcon Engineering Co. v. Wright, 171 Ill. App. 519; Douglass v. Suggs, 36 Ill. App. 554.

The rule is well established that a motion to set aside a judgment by default or a judgment ex parte is addressed to the discretion of the court and a court of review will not interfere except in the case of abuse of discretion. Even if the defendant had filed an answer which on its face was sufficient to constitute a defense, it is within the discretion of the court to deny a motion to vacate a judgment rendered ex parte against a defendant if he has been guilty of negligence or if the circumstances show that his defense is a sham or he is acting in bad faith. Plaff v. Pacific Express Co. 251 Ill. 243; Staunton Coal Co. v. Menk, 197 Ill. 369. When we come to examine the record in this case as filed it is indicated that no report of the proceedings was filed that was signed by the court, and it will be presumed that the facts presented to the court were considered and the laws applied to the facts were justified and that the court did not err in refusing to vacate the judgment upon the theory presented by the defendant. Other questions are in this record which, in view of the conclusion which has been reached by the trial court and its denial of defendant's motion, it will not be necessary under the circumstances for this court to pass upon, as such questions were called to the court's attention and given due consideration.

We are of the opinion that the court did not err in denying the motion of the defendant to vacate the judgment.

THE JUDGMENT OF THE COURT IS AFFIRMED.
BURKE, P.J. AND KILEY, J. CONCUR.

The court, after due consideration, denies the motion of
the defendant to vacate the judgment that was entered on July 1, 1901.
It appears that at no time did a report of the proceedings
appear in the record and it must be presumed that all issues and
questions of fact were properly determined by the trial judge.

Jackson v. Bataan, 180 Ill. 609; Treadlin County v. Bataan, 180 Ill. 609;
180 Ill. App. 216; Tibbitts-Hewitt Grocery Co. v. Tabor, 180 Ill. App. 216;
180; Falcon Distributing Co. v. Wright, 177 Ill. App. 216; 180; 180; 180; 180;
Rutledge, 38 Ill. App. 554.

The rule is well established that a motion to set aside a
judgment by default or a judgment ex parte is addressed to the
discretion of the court and a court of review will not interfere
except in the case of abuse of discretion. Even if the defendant had
filed an answer which on its face was sufficient to constitute a
defense, it is within the discretion of the court to deny a motion to
vacate a judgment rendered ex parte against a defendant if he has been
guilty of negligence or if the circumstances show that his defense
is a sham or he is acting in bad faith. Plaintiff v. Pacific Telephone Co.,
251 Ill. 243; Alton Coal Co. v. Lane, 197 Ill. 389. When we come
to examine the record in this case as filed it is indicated that no
report of the proceedings was filed that was signed by the court, and
it will be presumed that the facts presented to the court were correct
and the laws applied to the facts were justified and that the court
did not err in refusing to vacate the judgment upon two short arguments
by the defendant. Other questions are in this record which, in view
of the conclusion which has been reached by the trial court and the
denial of defendant's motion, it will not be necessary to discuss
at length for this court to pass upon, as such questions were called to
the court's attention and given no consideration.

We are of the opinion that the court did not err in denying
the motion of the defendant to vacate the judgment.

THE JUDGMENT IN THE CASE IS AFFIRMED.

SURE, A. L. AND ELLIOT, J. CONCUR.

41150

T. C. FREDRICH,

Appellant,

v.

CHARLES J. WOLF and EDMUND J. THIELE,
Executor of the Estate of MARGARET
THIELE, Deceased,

Appellees.

APPEAL FROM

316 I.A. 672

SUPERIOR COURT

COOK COUNTY.

ON REHEARING

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order vacating and setting aside plaintiff's judgment and dismissing the action as to the defendant Thiele.

Plaintiff was the assignee of a judgment for \$6,660.83 confessed on February 10, 1933 by Walter A. Huebsch as successor receiver of the Brookfield State Bank against Charles Wolf and Margaret Thiele. May 18, 1939, Edmund J. Thiele, executor of the Estate of Margaret Thiele, deceased, filed a petition to open and vacate the judgment as to the decedent. The trial court opened the judgment, excused plaintiff from replying to the executor's petition, and heard evidence on the plaintiff's pleadings and defendants' petition and the affidavit in support thereof. The order appealed from followed.

The affidavit of the executor stated that Margaret Thiele, his grandmother, died December 30, 1935; that the first knowledge he had of the judgment against her was about April 15, 1939, when, as executor, he was served with notice; that she lived with him two years prior to her death and was 81 years old; that he was her confidant in business matters and she had never mentioned the note sued on nor the indebtedness represented thereby; and that he knows she received no notice of any kind concerning the judgment and that the signature on the note ^{purporting} ~~purported~~ to be hers was a forgery.

At the hearing plaintiff, under section 60 of the Practice Act, called the defendant Wolf, decedent's son-in-law as an adverse party. Wolf testified that he signed Margaret Thiele's name to the note. The court sustained the executor's objections to all questions directed to Wolf by plaintiff's counsel which sought to elicit the conversations between decedent and Wolf with respect to the latter's authority to sign decedent's name. The trial court also rejected an offer by plaintiff to prove that the decedent authorized her signature on the note; and that because she was in ill health and could not sign her name, Wolf signed it at her request. The court likewise rejected an offer of plaintiff to prove that decedent was but an accommodation signer having no liability to Wolf.

The objections to testimony regarding conversations had with decedent and the rejections of offers of proof were based on section 2 of the Evidence Act. The pertinent part of that section reads as follows:

"No party to any civil action, * * * or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, * * * when any adverse party sues or defends as * * * the executor * * * of any deceased person * * * unless when called as a witness by such adverse party * * *."

Plaintiff contends the judgment was opened only as to the executor and that, consequently, under the ruling in Webb v. The Willett Co., 309 Ill. App. 504, Wolf was no longer a party and not incompetent under section 2. The Willett case does not apply because there separate judgments were entered against two defendants and one, found not guilty, was held not a party on the second trial of his co-defendant and, therefore, a competent witness. In the case at bar judgment was under a joint warrant of attorney and was not several (Mayer v. Pick, 192 Ill. 561); having been entered prior to January 1, 1934, was not divisible (Nash v. Clark, 310 Ill. App. 437-441); and, accordingly, the order opening the judgment included both defendants. At the time of the trial, therefore, Wolf was a party and, furthermore, was called by the plaintiff as a party

under section 60.

The situation presented here is novel and no case cited by counsel is precisely applicable.

Wolf did not testify of his own motion and the executor is not an adverse party to Wolf but a defendant with him, therefore, in a technical sense, it might be said that Wolf was competent to testify under the section quoted. The principle underlying the part of section 2 under consideration here is protection against the temptation on the part of a surviving party to give false testimony with reference to a transaction between him and the decedent, and also, because the legislature considered a personal representative unable to oppose statements of such survivor, to place the parties on terms of equality with reference to the opportunity of giving testimony. Van Meter v. Goldfarb, 317 Ill. 620. Applying that principle to the case before us, it is clear that while the executor was not formally an adverse party to Wolf, nevertheless the latter was attempting to testify as a surviving party to a transaction with decedent and which testimony the executor would be unable to meet; and that Wolf, actually, was attempting to testify in his own behalf, because the testimony offered through him tended to postpone his detriment on the note. In view of the purpose of section 2, the means employed here to avoid it will not prevent its application. The only means available by which Wolf, under the circumstances, would be rendered competent to testify to the conversations, were being called as executor's witness to testify to them; or, under the third exception in section 2, to meet testimony produced by executor of them. The fact that Wolf was called by plaintiff under section 60 of the Practice Act, does not change our holding because section 60 is subject to the provisions of the Evidence Act.

Because of our conclusion we need not consider the question whether Wolf had such an interest in the outcome of the case as would render him incompetent under section 2 if he were not incompetent

under section 30.

The situation presented here is novel and has not been

by counsel is precisely analogous.

Wolf did not testify of his own motion and the testimony

is not an adverse party to Wolf but a statement with him, therefore,

in a technical sense, it might be said that Wolf was competent to

testify under the section quoted. The principle underlying the part

of section 3 under cancellation here is protection against the

temptation on the part of a surviving party to give false testimony

with reference to a transaction between him and the decedent, and this

because the legislature considered a certain protective measure

to oppose statements of such character, to place the parties on terms

of equality with reference to the opportunity of giving testimony.

Van Meter v. Colclough, 217 Ill. 622. Another case relative to

the case before us, it is clear that while the question was not

formally an adverse party to Wolf, nevertheless the latter was allowed

ing to testify as a surviving party to a transaction with decedent and

which testimony the executor would be liable to impeach and Wolf,

actually, was attempting to testify in his own behalf, and the

many offered through his father to impeach his testimony on the same

In view of the scope of section 3, the same reasoning may be applied

it will not prevent its application. The same reason available in

which Wolf, under the circumstances, would be permitted to impeach

testify to the conversation, were being called as a surviving party

to testify to that, or, under the third question in section 3, to

test testimony produced by executor or third party that Wolf

was called by plaintiff under section 30 as the executor, and, under

not change our holding because section 30 is subject to the provision

of the witness act.

Because of the conclusion we reach and consider the question

whether Wolf has such an interest in the outcome of the case as would

render his incompetent under section 3 if he were not incompetent

thereunder as a party.

Plaintiff says that when the court accepted the executor's sworn statements of the transaction between Wolf and decedent, he had placed the plaintiff on an unequal basis by refusing to accept plaintiff's testimony of the same. The affidavit was not received as evidence but only as a foundation for the motion to open the judgment and allow the executor to defend. The judgment having been opened and the plaintiff showing that Wolf signed the decedent's name, plaintiff then had the burden of showing the additional fact of his authority to sign and thus overcome the defense apparent from the executor's affidavit. The burden of the proof is the burden of competent proof. The proof offered was incompetent and the court could not admit it over the objection of the executor. Plaintiff further says that if the executor could render Wolf competent to testify, by calling Wolf as executor's witness, so could plaintiff render Wolf competent by calling him as plaintiff's witness. That is not so. The section is intended to give protection to the executor and under it the executor alone can waive the protection. He has not waived it in this case.

For the reasons herein given the order is affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.

thereunder as a party.

Plaintiff says that when the court decided the executor's sworn statements of the transactions between him and deceased, he had placed the plaintiff on an unusual basis as to being a party to the plaintiff's testimony of the same. The plaintiff was not treated as a witness but only as a foundation for the action to give the judgment and allow the executor to defend. The plaintiff never opened and the plaintiff showed that he signed the executor's name, plaintiff then had the burden of showing the executor's testimony of his authority to sign and that was the burden of the executor's affidavit. The burden of the proof is on the burden of competent proof. The proof offered was incompetent and the court could not admit it over the objection of the executor. Plaintiff further says that if the executor could tender his competent testimony, by calling him as executor's witness, he could plaintiff would not be competent to call him as a witness. That is not so. The action is founded in state protection to the executor and under it the executor is not to be protected. He has not waived it in this case. For the reasons herein given the court is affirmed.

WITNESSES:

WITNESSES: J. M. HARRIS, J. HARRIS.

41150

T. C. FREDRICH,

Appellant,

v.

CHARLES J. WOLF and EDMUND J. THIELE,
Executor of the Estate of MARGARET
THIELE, Deceased,

Appellees.

APPEAL FROM

SUPERIOR COURT

DEA COUNTY.

316 I.A. 672

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order vacating and setting aside plaintiff's judgment and dismissing the action as to the defendant Thiele.

Plaintiff was the assignee of a judgment for \$8,660.63 confessed on February 10, 1933 by Walter A. Huebach as successor receiver of the Brookfield State Bank against Charles Wolf and Margaret Thiele. May 18, 1939, Edmund J. Thiele, executor of the Estate of Margaret Thiele, deceased, filed a petition to open and vacate the judgment as to the decedent. The trial court opened the judgment, excused plaintiff from replying to the executor's petition, and heard evidence on the plaintiff's pleadings and defendants' petition and the affidavit in support thereof. The order appealed from followed.

The affidavit of the executor stated that Margaret Thiele, his grandmother, died December 30, 1938; that the first knowledge he had of the judgment against her was about April 15, 1939, when, as executor, he was served with notice; that she lived with him two years prior to her death and was 81 years old; that he was her confidant in business matters and she had never mentioned the note sued on nor the indebtedness represented thereby; and that he knows she received no notice of any kind concerning the judgment and that the signature on the note reported to be hers was a forgery.

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Ill. Stats. Ann. 104.060

At the hearing plaintiff, under section 60 of the Practice Act, called the defendant Wolf, decedent's son-in-law as an adverse party. Wolf testified that he signed Margaret Thiele's name to the note. The court sustained the executor's objections to all questions directed to Wolf by plaintiff's counsel which sought to elicit the conversations between decedent and Wolf with respect to the latter's authority to sign decedent's name. The trial court also rejected an offer by plaintiff to prove that the decedent authorized her signature on the note; and that because she was in ill health and could not sign her name, Wolf signed it at her request. The court likewise rejected an offer of plaintiff to prove that decedent was but an accommodation signer having no liability to Wolf.

The objections to testimony regarding conversations had with decedent and the rejections of offers of proof were based on section 2 of the Evidence Act. The pertinent part of that section reads as follows:

"No party to any civil action, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, when any adverse party sues or defends as the executor of any deceased person unless when called as a witness by such adverse party."

The situation presented here is novel and no case cited by counsel is precisely applicable.

Wolf did not testify of his own motion and the executor is not an adverse party to Wolf but a defendant with him, therefore, in a technical sense, it might be said that Wolf was competent to testify under the section quoted. The principle underlying the part of section under consideration here is protection against the temptation on the part of a surviving party to give false testimony with reference to a transaction between him and the decedent, and also, because the legislature considered a personal representative unable to oppose statements of such survivor, to place the parties on terms of

equality with reference to the opportunity of giving testimony. VanMeter v. Goldfarb, 317 Ill. 820. Applying that principle to the case before us, it is clear that while the executor was not formally an adverse party to Wolf, nevertheless the latter was offering testimony as a surviving party to a transaction with decedent and which testimony the executor would be unable to meet; and that Wolf, actually, was testifying in his own behalf, because the testimony offered through him tended to postpone his detriment on the note. In view of the purpose of section 2, the means employed here to avoid it will not prevent its application. The only means available by which Wolf, under the circumstances, would be rendered competent to testify to the conversations, were being called as executor's witness to testify to them; or, under the third exception in section 2, to meet testimony produced by executor of them. The fact that Wolf was called by plaintiff under section 60 of the Practice Act, does not change our holding because section 60 is subject to the provisions of the Evidence Act.

Because of our conclusion we need not consider the question whether Wolf had such an interest in the outcome of the case ^{as} would render him incompetent under section 2 if he were not incompetent thereunder as a party.

Plaintiff says that when the court accepted the executor's sworn statements of the transaction between Wolf and decedent, he had placed the plaintiff on an unequal basis by refusing to accept plaintiff's testimony of the same. The affidavit was not received as evidence but only as a foundation for the motion to open the judgment and allow the executor to defend. The judgment having been opened and the plaintiff showing that Wolf signed the decedent's name, plaintiff then had the burden of showing the additional fact

of his authority to sign and thus overcome the defense apparent from the executor's affidavit. The burden of the proof is the burden of competent proof. The proof offered was incompetent and the court could not admit it over the objection of the executor. Plaintiff further says that if the executor could render self competent to testify, by calling self as executor's witness, so could plaintiff render self competent by calling him as plaintiff's witness. That is not so. The section is intended to give protection to the executor and under it the executor alone can waive the protection. He has not waived it in this case.

For the reasons herein given the order is affirmed.

ORDER AFFIRMED.

BURKE, F.J., and WHEEL, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS,
ex rel JOHN S. RUSCH,

Appellee,

EDWARD WINTER, MORRIS FEINBERG,
JOHN CAMINATI and JAMES KNEFELI,

Appellants.

316 I.A. 673
APPEAL FROM

COUNTY COURT

COOK COUNTY.

ON REHEARING

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County Court which found the respondents, election officials in the 16th precinct of the 1st ward, Chicago, Illinois, guilty of contempt of court for misconduct at the Judicial Election of June 5, 1939. The respondents Winter and Feinberg were sentenced to the County Jail for two years and Caminati and Knefeli each for six months.

The proceeding was commenced by a petition of John Rusch, Chief Clerk of the Board of Election Commissioners, Chicago, for a rule upon respondents to show cause why they should not be held in contempt of court. The rule issued, the respondents were arrested under writs of attachment issued out of the County Court, and, after trial, the rule was made absolute against respondents and the order appealed from followed. E. C. Saks, named in the petition with respondents, was not arrested and was not tried.

The petition filed by Rusch charges that the respondents knowingly permitted or acquiesced in permitting certain persons to commit offenses against the election laws; knowingly refused to properly perform their duties as election officials; knowingly made a false canvass, tally, proclamation and return of the vote cast; and, fraudulently and corruptly made a false certificate of the true vote cast in the precinct in which they served as election officials. The judgment order finds that respondents knowingly, fraudulently and unlawfully made a false canvass, tally, proclamation and return of votes cast; knowingly, fraudulently and unlawfully

PEOPLE OF THE STATE OF ILLINOIS,
ex rel JOHN F. WINTER,

vs.

EDWARD WINTER, WALTER WINTER,
JOHN CAMINATI and JOHN CAMINATI,

Defendants.

ON PETITION

MR. JUSTICE ALLEN delivered the opinion of the court.

This is an appeal from an order of the County Court which found the respondents, election officials in the 14th precinct of the 1st ward, Chicago, Illinois, guilty of contempt of court for misconduct at the Judicial Election of June 8, 1922. The respondents Winter and Weinberg were sentenced to the County Jail for two years and Garinetti and Kretschmer for six months.

The proceeding was commenced by a petition of John W. Winter, Chief Clerk of the Board of Election Commissioners, Chicago, for a rule upon respondents to show cause why they should not be held in contempt of court. The rule issued, the respondents were required under writs of attachment issued out of the County Court, and, after trial, the rule was made absolute against respondents and the order appealed from followed. A writ of habeas corpus issued in this matter with respondents, was not granted and was not tried.

The petition filed by respondents that the respondents knowingly permitted or authorized in violation of certain sections to commit offenses against the election laws; knowingly caused to properly perform their duties as election officials; knowingly used a false canvas, tally, proclamation and return of the vote; and, fraudulently and corruptly made a false proclamation of the true vote cast in the precinct in which they acted as election officials. The judgment order finds that respondents knowingly and fraudulently and corruptly made a false canvas, tally, proclamation and return of the vote; knowingly, fraudulently and corruptly

permitted or acquiesced in permitting persons other than the voter to sign applications for, and the same persons to cast ballots; knowingly, etc., permitted or acquiesced in permitting an application to be signed and a vote cast in the name of a man then dead; knowingly, etc., permitted or acquiesced in permitting ballots to be erased, altered or changed by persons other than the voters; knowingly, etc., certified to the Board as cast, an untrue and incorrect total vote, and thereby fraudulently, corruptly and unlawfully caused a difference in the actual vote and the vote certified; and that respondents and each of them were guilty of contempt and misbehavior by virtue of the foregoing.

In the precinct involved here Sabs served as Republican Judge, Winter and Feinberg as Democratic Judges, Caminati as Republican Clerk and Knefeli as Democratic Clerk. They were appointed by the Board of Election Commissioners. Winter was not a resident of the precinct at the time and had acted as an election official off and on for about five years. Feinberg had, at the time, lived in the precinct over a year and had served once before. Caminati lived 19 years in the precinct and had served twice before, Knefeli did not live in the precinct and had served three times before. While the voting was in progress Caminati printed the names of the voters on the applications for ballots; Sabs and Winter checked the signatures on applications with the corresponding signatures in the precinct binder; Knefeli filed the application blanks in the binder; and Feinberg initialed and gave ballots to voters after the signatures were checked. At the close of the polls several watchers with proper credentials attended the sorting and counting of the ballots. The ballot boxes were emptied by the Judges of Election, were sorted and placed before Sabs who counted the votes and called the count to Caminati and Knefeli who recorded it.

permitted or encouraged in permitting persons other than the voter to sign applications for, and the same persons to cast ballots; knowingly, etc., permitted or encouraged in permitting an application to be signed and a vote cast in the name of a man then dead; knowingly, etc., permitted or encouraged in permitting ballots to be erased, altered or changed by persons other than the voter; knowingly, etc., certified to the board as cast, in answer and incorrect total vote, and thereby fraudulently, corruptly and unlawfully caused a difference in the actual vote and the vote certified; and that respondents and each of them were guilty of contempt and misbehavior by virtue of the foregoing.

In the precinct involved herein were served as Republican judges, Winter and Knefel as Republican Clerk and Knefel as Republican Clerk. They were assisted by the Board of Election Commissioners. Winter was not a resident of the precinct at the time and had acted as an Election official of and on for about five years. Knefel had, at the time, lived in the precinct over a year and had served once before. Knefel lived 12 years in the precinct and had served twice before, Knefel did not live in the precinct and had served three times before. The voting was in progress Knefel printed the names of the voters on the applications for ballots; Knefel and Winter checked the signatures on applications with the corresponding signatures in the precinct binder; Knefel filed the application binder in the binder; and Knefel initialed and gave ballots to voters after the signatures were checked. At the close of the polls Knefel returned with original credentials attended the sorting and counting of the ballots. The ballot boxes were emptied by the judges of election, were sealed and placed before them who counted the votes and tallied the amount. Knefel and Knefel who recorded it.

After the canvass and tally of the votes in the precinct the ballot boxes were sealed and the seals signed and the boxes delivered to employees of the Election Commissioners in the City Hall. The boxes were immediately transported, under guard, to Werners Brothers Storage House, where they were stored in a sealed vault. On October 24, 1939, they were taken to the Election Commissioner's, placed in a vault and on that day turned over to James Connery, special commissioner appointed by the trial court. The boxes were taken by Connery to a table in the Election Commissioner's Office and there the seals were broken and an official recount made by him, in accordance with the order appointing him. After the recount Connery resealed the boxes, and delivered them back to the custodian. On January 9, 1940, the seals were again broken by employee Karsland of the Election Commissioners' office, apparently without order of court, and the contents of the boxes emptied on a table in that office to enable a handwriting expert to examine the ballots for evidence to support the petition. Respondents were not present on either occasion when the seals were broken, nor during the recount or the examination by the expert, although Attorney Dowd, who appears to have represented the respondents at the initial hearing, signed with Connery, the seal of a box which did not contain the ballots here in question. Connery, except for Dowd's signature on the seal of that box, had no recollection of the latter's presence at the recount. Counsel and the trial court discussed calling Dowd as a witness but he was not called. No one appeared for the respondents at the examination of the ballots. Both openings of the boxes occurred out of court and out of the presence of the trial judge.

The testimony of the various persons who had custody of the boxes, removed them, broke the seals upon them, handled the contents and resealed the boxes is, that the contents thereof, except for numbers on the ballots made by a numbering machine under Connery's supervision, were in the same condition at the trial as when received

After the canvass and tally of the votes in the precincts, ballot boxes were sealed and the seals signed and the boxes delivered to employees of the Election Commission in the City Hall. The boxes were immediately transported, under guard, to certain precincts, where they were stored in a sealed vault. In October 24, 1940, they were taken to the Election Commission's place in a vault and on that day turned over to James Connery, Council Commissioner appointed by the trial court. The boxes were taken by Connery to a table in the Election Commissioner's office and there the seals were broken and an official account made by him, in accordance with the order appointing him. After the account Connery revealed the boxes, and delivered them back to the custodian. In January 8, 1940, the seals were again broken by employees acting at the Election Commissioner's office, apparently without order of court, and the contents of the boxes entitled on a table in that office to enable a handwriting expert to examine the ballots for evidence to support the petition. Defendants were not present on either occasion when the seals were broken, nor during the removal or the examination by the expert, although Attorney Bond, who claimed to have represented the respondents at the initial hearing, stated with Connery, the seal of a box which did not contain the ballots here in question. Connery, except for Bond's signature on the seal of that box, had no recollection of the latter's presence at the trial court and the trial court likewise called him as a witness and he was not called. No one appeared for the respondents at the examination of the ballots. Both openings of the boxes occurred out of court and out of the presence of the trial judge.

The testimony of the various persons who had custody of the boxes, removed them, broke the seals upon them, handled the ballots and revealed the boxes is, that the contents thereof, except for numbers on the ballots made by a handwriting specialist under Connery's supervision, were in the same condition as was found on when received

by the Election Commissioners; and that the contents of the boxes have not been tampered with, erased, altered or interfered with in anywise. Respondents contend that there was opportunity to tamper with the ballots and that the circumstances surrounding the ballot boxes and ballots after they came into possession of the Election Commissioners and until the trial, affects the integrity of the ballots as evidence; and, further, that no contest was pending and that the boxes were, therefore, illegally opened. The petitioner answers that the Supreme Court decided these contentions adversely to the respondents in Stockholm v. Daly, 374 Ill. 441. In the recent case of The People v. Ferro, et al, Opinion No. 41404, the Second Division of this Court characterized as "unsafe" the procedure or method employed here in recounting the ballots by a Special Commissioner outside the presence of the trial court. The court there also held that since Connery was ordered to examine the ballots on the recount and since the recount disclosed no erasures or alterations, then, because later an expert discovered erasures and alterations among the ballots counted, the inference was that there was tampering, and the integrity of the ballots as evidence was destroyed. In the case before us there is no record of a written order appointing Connery. He was directed orally by the court to "take them down to the Election Commissioners Office and recount them".

Connery testified that he did not believe that he made a memorandum of the condition of the ballots at the time of the count and had no recollection of any erasures on ballots. It is clear, however, that he personally counted as valid ballots those identified at the trial by the expert as having been erased.

At the election, out of which this proceeding arose, in addition to the judicial ballot, a separate proposition ballot was voted, one proposition concerning Oak Forest Infirmary and the other the Cook County Hospital. The vote for judges certified from the

by the Election Commission; and that the contents of the boxes have not been tampered with, except, it was stated, in connection with the answer. Respondents contend that there was responsibility to answer with the ballots and that the circumstances surrounding the boxes and ballots after they were into possession of the Election Commission and until the trial, reflects the integrity of the ballots as evidence; and, further, that no contact was pending and that the boxes were, therefore, properly opened. The testimony answers that the Supreme Court decided these conditions adversely to the respondents in Booth v. City of Chicago, 174 Ill. 441. In the recent case of The People v. Carter, et al., Opinion No. 4144, the Second Division of this Court characterized as "correct" the procedure or method employed here in recounting the ballots of a Special Commission outside the presence of the trial court. The court there also held that since Connery was ordered to recast the ballots on the record and since the record disclosed no structural or clerical error, there, because later an expert discovered structural and clerical errors, the ballots counted, the inference was that there was tampering, and the integrity of the ballots as evidence was destroyed. In the case before us there is no record of a written order compelling Connery. We are directed orally by the court to "take them down to the Election Commissioners Office and recount them". Connery testified that he did not believe that he made a memorandum of the condition of the ballots at the time of the count and had no recollection of any error in the count. It is clear, however, that he personally counted as valid ballots those identified at the trial by the expert as having been altered. At the election, out of which this proceeding arose, in addition to the judicial ballot, a separate proposition ballot was voted, one proposition concerning the County Infirmary and the other the Cook County Hospital. The vote for Judges carried from the

16th precinct was, Straight Democratic 241, Straight Republican 7. No votes for individual candidates were certified as cast. The certified vote for propositions was Oak Forest Infirmary For 121, Against 42; Cook County Hospital For 122, Against 41. Connery's recount of the ballots cast in the precinct disclosed no discrepancy in the number of judicial ballots certified and a discrepancy of one vote in each of the propositions.

Seven Straight Republican ballots were certified from the precinct and appeared in the recount. The handwriting expert testified that in her opinion, based upon an examination of the ballots, erasures had been made of crosses on 32 Judicial ballots and that 29 of such erasures appeared in the Republican circle or Republican circles or squares. The expert testified to other findings which are not relevant to our review of the judgment. The record does not show a breakdown of the erased ballots into straight and split ballots, except for 6 ballots identified as having been erased in the Republican circle. Eleven persons testified that they voted the straight Republican ticket at the election, of these Osborn Ousley remembered that "Green and Mr. Kelly ran for office on June 5, 1939"; the testimony of the witness Jessie Parker as to how she voted is too vague for consideration; and Snowden "could not swear" that the signature on the application was his and his testimony of voting is not definite. Were it not for the fact that a majority of registered voters in Cook County do not vote in Judicial Elections, an inference might be justified that Snowden voted at the subject election. Two Judicial ballots appear to have been rejected as spoiled, but the record does not disclose whether or how they were marked. Several witnesses testified that they voted split tickets, but there is no evidence of any ballots having been marked in Democratic squares, nor was any evidence given by the expert that erasures had been made in Democratic squares, nor were any ballots counted or recounted for individual Democratic candidates. Also, of

18th precinct was, straight Democratic 231, straight Republican 7. No votes for individual candidates were certified in any. The certified vote for propositions was 100 for and 100 against for 11, Against 42; Cook County Hospital for 11, Against 41. The record of the ballot case in the precinct included no discrepancy in the number of judicial ballots certified and a discrepancy of one vote in each of the propositions.

Even straight Republican ballots were certified from the precinct and appeared in the record. The handwriting expert testified that in her opinion, based upon an examination of the ballots, errors had been made in crosses on 33 judicial ballots and that 29 of such errors appeared in the Republican circle or Republican circles or squares. The expert testified to other findings which are not relevant to our review of the judgment. The record does not show a breakdown of the errors into straight and split ballots, except for 6 ballots identified as having been crossed in the Republican circle. Seven persons testified that they voted the straight Republican ticket at the election, of those persons only two stated that "Green and Mr. Kelly ran for office on June 7, 1933"; the testimony of the witness Jesse Barker as to how many votes he gave for Green and Snowden "could not swear" that the signature on the application was his and his testimony of voting is not reliable. It is not for the first time a majority of registered voters in Cook County do not vote in judicial elections, an inference might be justified that Snowden voted at the judicial election. Two judicial ballots appear to have been rejected as spoiled, but the record does not disclose whether or how they were marked. Several attorneys testified that they voted split tickets, but there is no evidence of any ballots having been marked in Democratic squares, nor are any ballots filed by the expert that errors had been made in Democratic squares, nor were any ballots counted or recounted for individual Democratic candidates. Also, of

those witnesses, Ethel Godfrey and Howard Zeh remembered that Judge Holland's name appeared on the ticket. It is conceded Judge Holland's name was not on the ballot. The witnesses Griffiths, Dunn, Priscilla Hills and Will Strong add nothing by their testimony to the determination of the issues in this case, and Rebecca Ousley's testimony is contradicted by her husband. There is no contention and no evidence that any of the Respondents erased or altered any ballots nor that they placed crosses on any ballots so erased or altered.

It is clear from the evidence that forgeries were committed. Several witnesses testified that the signatures purporting to be theirs on applications, were forgeries. There is no evidence that the forgeries were committed by the respondents. They deny that they committed forgery and they and Otto Rockman, a precinct captain who attended the count, deny that any forgeries were committed in their presence or with their permission, acquiescence or knowledge. There is no evidence that the respondents knew or should have known any of the persons whose names were forged and no witnesses who testified to forgery say that they knew the respondents. It is clear also that the name of Albert R. Miller, who died before the election, was forged to an application, but again there is no evidence connecting the respondent with the forgery, nor again is there any evidence that the respondents knew Albert Miller and there is the same testimony of, and in support of, respondents' denials of any wrongdoing or knowledge thereof. There was evidence introduced to prove other irregularities, but no finding in the order was based thereon and we shall not consider that evidence.

A summary of the evidence to sustain the finding with relation to erasures and alterations in the contempt order shows the reliable testimony of 8 witnesses who cast straight Republican ballots, 2 split ballots, with no evidence as to whether or how they were marked and the certification of 7 Straight Republican ballots; apparently reliable testimony of the voting of 5 split ballots, plus the testimony of the expert of an indefinite number of erasures in Republican squares

those witnesses, Ethel Coffey and Edward Ten Eyck, who testified that they had seen the defendant on the night of the murder. It is contended that the name was not on the list. The witness Coffey, however, testified that she saw the defendant and that she saw him with a woman named Hilie and Will Strong and nothing by their testimony on the testimony of the defendant in this case, and hence Coffey's testimony is contradicted by her husband. There is no contradiction and no evidence that any of the respondents erased or altered any ballots nor that they placed crosses on any ballots as erased or altered.

It is clear from the evidence that forgeries were committed. Several witnesses testified that the signatures purporting to be theirs on applications, were forgeries. There is no evidence that the forgeries were committed by the respondents. They deny that they committed forgery and they and Otto Lockman, a witness who testified that any forgeries were committed in their presence or with their permission, acquiescence or knowledge. There is no evidence that the respondents knew or should have known that the persons whose names were forged and no witnesses who testified to the forgeries say that they knew the respondents. It is clear also that the name of Albert R. Miller, who died before the election, was forged on an application, but again there is no evidence connecting the respondents with the forgery, nor again is there any evidence that the respondents knew Albert Miller and there is the same testimony of, and in support of, respondents' denials of any wrongdoing or knowledge thereof. The evidence introduced to prove other irregularities, but no finding in the order was based thereon and we shall not consider that evidence. A summary of the evidence to sustain the finding with relation to erasures and alterations in the ballots and the testimony of 8 witnesses who testified that they were marked and ballots, with no evidence as to whether or not they were marked and the certification of 7 ballots as valid ballots; and the reliable testimony of the voting of 5 valid ballots, since the finding of the expert of an indefinite number of erasures in Republican ballots.

and the absence of any votes counted for individual Democratic judges on the recount, and the absence of testimony of any erasures in Democratic squares. To sustain the finding based on the forgeries, there is the reliable testimony of forgeries, without a showing that the respondents knew or should have known the persons whose names were forged and no testimony that such persons knew the respondents. Against this are the denials of the respondents supported by another witness of any of the charges against them; the absence of the testimony of the duly credentialed watchers who observed the post-election canvass and count in the polling place; and the several witnesses to the good character of the respondents.

We believe from what we have pointed out hereinabove that the evidence justifies no finding that the respondents knowingly, fraudulently and unlawfully permitted or acquiesced in permitting the commission of the unlawful acts recited in the order. On the basis of this evidence, the trial court to justify the order entered, was required to infer that the respondents knowingly permitted or acquiesced in permitting the various unlawful acts in connection with which they were found guilty and to infer that they falsified the count and the certificate of the count. This court has announced often the requirement of the proof necessary to sustain a contempt order of this kind.

In the case of People, ex rel Rusch v. Wojcik, et al., Opinion No. 39351, this court said:

"While * * * it is not necessary to establish the guilt of respondent beyond all reasonable doubt, it has been held in such a case the petitioner is required to produce 'most convincing evidence of the truth of the charge'."

Remarks of Justice Matchett in that case referring to the required proof are applicable here,

"This is more particularly true when a judgment so severe as this is entered. The effect of the judgment is to deprive respondents of their liberty and humiliate them to an extreme degree, and such punishment is not to be inflicted upon uncertain and doubtful evidence."

and the absence of any votes counted for individual Democratic tickets on the record, and the absence of testimony of any character to sustain the finding made on the foregoing, Democratic answer. To sustain the finding made on the foregoing, there is the reliable testimony of witnesses, without a showing that the respondents knew or should have known the persons whose names were forged and no testimony that such persons knew the respondents. Against this are the denials of the respondents supported by another witness of any of the charges against them; the absence of the testimony of the duly credentialed witnesses who observed the post-election canvass and count in the polling place; and the several witnesses to the good character of the respondents.

We believe from what we have stated out hereinabove that the evidence justifies no finding that the respondents knowingly, fraudulently and unlawfully permitted or assisted in permitting the commission of the unlawful acts recited in the order. On the basis of this evidence, the trial court is justified in the order entered, was required to enter that the respondents knowingly permitted or assisted in permitting the various unlawful acts in connection with which they were found guilty and to enter that they falsified the count and the certificate of the count. This court has announced often the requirement of the proof necessary to sustain a conviction of this kind.

In the case of People v. ..., 32 Cal. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Remarks of Justice Stephens in that case relating to the required proof are applicable here.

"This is more particularly true when a judgment is entered as this is entered, the effect of the judgment is to deprive respondents of their liberty and qualify them to an extent here, and such judgment is not to be entered upon uncertain and doubtful evidence."

Petitioner contends and we agree that this court held in People, ex rel Rusch v. Garbacz, et al., No. 41336 and People, ex rel Greenzeit, 277 Ill. App. 479, that proof need not be made that the respondents themselves committed the election offenses charged, and that Chapter 46, Par. 186 Ill. Rev. Stats. authorizes the County Judge to punish Election Officials for contempt for misbehavior and gross carelessness in the performance of their duties. The proof nevertheless to justify such punishment must meet the requirements of the rule in this State and there must be a finding of such misconduct or gross carelessness based on sufficient evidence. In the Greenzeit case, the discrepancies appearing between the respondents' tally and that on recount ranged from 5 to 42 votes and this court said the trial court was justified in finding that a respondent there knowingly, etc. made a false canvass and return and approved the judgment sentencing that respondent to 60 days in the County Jail and imposing fines of \$150.00 and costs on others. In the Garbacz case, where 29 witnesses recorded as voting, testified that they did not, this court reversed the judgment and directed the trial court to reduce respondent's punishment from 2 years to 90 days. We have examined at petitioner's request the case of The People, ex rel Rusch v. Montasano, et al., 293 Ill. App. 630, but do not find a similarity between the circumstances there and here. This court held that the Garbacz and Greenzeit cases were proper cases in which to punish the respondents for gross carelessness in the performance of duties. In the case at bar we must determine whether the judgment of the trial court is contrary to the manifest weight of the evidence. Our inquiry is limited to the judgment order, its findings and the evidence in support thereof. There was no evidence that the respondents did the unlawful acts found to have been committed. The evidence or legal inferences therefrom

Petitioner contends that we agree that this court said in People v. Murphy, 277 Ill. App. 475, that proof need not be made that the respondents themselves committed the election offense charged, and that Chapter 46, Rev. Stat. 1905, requires the county judge to punish election officials for contempt for disobedience and gross carelessness in the performance of their duties. The proof is required to justify such punishment must meet the requirements of the rule in this State and there must be a finding of such misconduct or gross carelessness based on sufficient evidence. In the present case, the discrepancies appearing between the respondents' tally and that on recount ranged from 5 to 47 votes and this court said the trial court was justified in finding that a respondent there knowingly, etc., made a false canvass and return and a verdict for judgment sentencing that respondent to 60 days in the County Jail and paying fine of \$150.00 and costs on others. In the present case, where the witness recorded as voting, testified that they did not, this court reversed the judgment and directed the trial court to reduce respondents' punishment from 3 years to 90 days. We have examined the petition, request the case of People v. Murphy, 277 Ill. App. 475, but do not find a similarity between the circumstances there and here. This court held that the present case and People v. Murphy were proper cases in which the respondents were gross carelessness in the performance of duties. In the case at bar we must determine whether the judgment of the trial court is necessary to the fullest weight of the evidence. Our inquiry is limited to the judgment order, its findings and the evidence in support thereof. There was no evidence that the respondents did the unlawful acts found to have been committed. The evidence of legal infirmities therefore

justify no finding that they knowingly permitted or acquiesced in permitting the commission of the several unlawful acts charged. Counsel for The People argue that evidence of failure to examine and count the ballots by tens, in the manner required by law, and the ballots, tally sheets, application sheets and other exhibits establish misconduct and misbehavior on the part of the respondents. We have considered hereinbefore the question pertaining to the exhibits. The judgment order does not find that the respondents were guilty of sorting and counting the ballots in a manner which violated the law, but finds that they were guilty of knowingly permitting or acquiesced in permitting the several unlawful acts recited and then finds, by reason thereof, the respondents guilty of misbehavior and contempt. The latter finding rests upon the specific prior findings and, consequently, cannot stand if they do not. Whether the respondents were guilty of misconduct other than that of which they were found guilty, is not before us.

For the reasons herein given the judgment of the County Court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, J. CONCURS.

BURKE, P.J. TOOK NO PART.

justify no finding that they knowingly withheld or concealed in permitting the commission of the several unlawful acts charged. Counsel for the people argue that evidence of failure to examine and count the ballots by vote, in the manner required by law, and the ballots, tally sheets, application books and other material actually miscounted and misbehavior on the part of the respondents, is duly considered heretofore the question submitted to the jury. The judgment order does not find that the respondents were guilty of sorting and counting the ballots in a manner which violated the law, but finds that they were guilty of knowingly withholding or concealing in permitting the several unlawful acts charged and that there, by reason thereof, the respondents guilty of misbehavior and concealment. The latter finding rests upon the specific facts findings and, consequently, cannot stand if they do not. Unless the respondents were guilty of misconduct other than that of which they were found guilty, is not before us. For the reasons herein given the judgment of the county court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEWELL, J. CONCURS.

BURR, P. J. TOOK NO PART.

41694

PEOPLE OF THE STATE OF ILLINOIS,
ex rel JOHN S. RUSCH,

Appellee,

v.

EDWARD WINTER, MORRIS FEINBERG,
JOHN CAMINATI and JAMES KNEFELI,
Appellants.

316 I.A. 673²
APPEAL FROM

COUNTY COURT

COOK COUNTY.

18a

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County Court which found the respondents, election officials in the 16th precinct of the 1st ward, Chicago, Illinois, guilty of contempt of court for misconduct at the Judicial Election of June 5, 1939. The respondents Winter and Feinberg were sentenced to the County Jail for two years and Caminati and Knefel each for six months.

The proceeding was commenced by a petition of John Rusch, Chief Clerk of the Board of Election Commissioners, Chicago, for a rule upon respondents to show cause why they should not be held in contempt of court. The rule issued, the respondents were arrested under writs of attachment issued out of the County Court, and, after trial, the rule was made absolute against respondents and the order appealed from followed. E. C. Saks, named in the petition with respondents, was not arrested and was not tried.

The petition filed by Rusch charges that the respondents knowingly permitted or acquiesced in permitting certain persons to commit offenses against the election laws; knowingly refused to properly perform their duties as election officials; knowingly made a false canvass, tally, proclamation and return of the vote cast; and, fraudulently and corruptly made a false certificate of the true vote cast in the precinct in which they served as election officials. The judgment order finds that respondents knowingly, fraudulently and

unlawfully made a false canvass, tally, proclamation and return of votes cast; knowingly, fraudulently and unlawfully permitted or acquiesced in permitting persons other than the voter to sign applications for, and the same persons to cast ~~xxx~~ ballots; knowingly, etc., permitted or acquiesced in permitting an application to be signed and a vote cast in the name of a man then dead; knowingly, etc., permitted or acquiesced in permitting ballots to be erased, altered or changed by persons other than the voters; knowingly, etc., certified to the Board as cast, an untrue and incorrect total vote, and thereby fraudulently, corruptly and unlawfully caused a difference in the actual vote and the vote certified; and that respondents and each of them were guilty of contempt and misbehavior by virtue of the foregoing.

In the precinct involved here Saks served as Republican Judge, Winter and Feinberg as Democratic Judges, Caminati as Republican Clerk and Knefel as Democratic Clerk. They were appointed by the Board of Election Commissioners. Winter was not a resident of the precinct at the time and had acted as an election official off and on for about five years. Feinberg had, at the time, lived in the precinct over a year and had served once before. Caminati lived 19 years in the precinct and had served twice before, Knefel did not live in the precinct and had served three times before. While the voting was in progress Caminati printed the names of the voters on the applications for ballots; Saks and Winter checked the signatures on applications with the corresponding signatures in the precinct binder; Knefel filed the application blanks in the binder; and Feinberg initialed and gave ballots to voters after the signatures were checked. At the close of the polls several watchers with proper credentials attended the sorting and counting of the ballots. The ballot boxes were emptied by the Judges of Election, were sorted and placed before Saks who counted the votes and called the count to Caminati and Knefel who recorded it.

unlawfully made a false count, fully, conscientiously and truthfully
vote cast; knowingly, fraudulently and unlawfully, admitted as
admitted in permitting persons other than the voter to vote in the election
tions for, and the same persons to cast xxx ballots; admitted, and
permitted or caused in permitting an agent to be sworn and
a vote cast in the name of a man then dead; knowingly, etc., permitted
or admitted in permitting ballots to be opened, altered or changed
by persons other than the voter; knowingly, etc., certified to the
board as cast, an untrue and incorrect total vote, and thereby fraudu-
lently, corruptly and unlawfully caused a difference in the total vote
and the vote certified; and that respondents and each of them were
guilty of contempt and disobedience of writ of the court.
In the precinct involved here John served as moderator
Judge, Jester and Jester as Democratic judges, admitted as judges
Clark and Knell as Democratic judges. They were admitted as the
board of election commissioners. Jester was not a resident of the
precinct at the time and had acted as an election official off and on
for about five years. Jester had, at the time, lived in the precinct
over a year and had served once before. Knell lived in the
the precinct and had served twice before. Knell did not live in the
precinct and had served three times before. While the voter and the
proper Knell printed the names of the voters on the ballots and
for ballots; Jester and Jester marked the ballots on the ballots
with the corresponding signatures in the correct places; Knell
filled the election blanks in the voter; and Jester Jester
and gave ballots to voters after the blanks were filled. It
the close of the polls Jester Jester with Jester Jester
attended the sorting and counting of the ballots. The ballots were
were sorted by the Jester at Jester, were sorted and placed in
Jester who counted the votes and called the count to Jester and
Knell who recorded it.

After the canvass^{and}/tally of the votes in the precinct the

ballot boxes were sealed and the seals signed and the boxes delivered to employees of the Election Commissioners in the City Hall. The boxes were immediately transported, under guard, to Werners Brothers Storage House, where they were stored in a sealed vault. On October 24, 1939, they were taken to the Election Commissioner's, placed in a vault and on that day turned over to James Connery, special commissioner appointed by the trial court. The boxes were taken by Connery to a table in the Election Commissioner's Office and there the seals were broken and an official recount made by him, in accordance with the order appointing him. After the recount Connery resealed the boxes, and delivered them back to the custodian. On January 9, 1940, the seals were again broken by employee Karsland of the Election Commissioners' office, apparently without order of court, and the contents of the boxes emptied on a table in that office to enable a handwriting expert to examine the ballots for evidence to support the petition. Respondents were not present on either occasion when the seals were broken, nor during the recount or the examination by the expert, although Attorney Dowd, who appears to have represented the respondents at the initial hearing, signed with Connery, the seal of a box which did not contain the ballots here in question. Connery, except for Dowd's signature on the seal of that box, had no recollection of the latter's presence at the recount. Counsel and the trial court discussed calling Dowd as a witness but he was not called. No one appeared for the respondents at the examination of the ballots. Both openings of the boxes occurred out of court and out of the presence of the trial judge.

The testimony of the various persons who had custody of the boxes, removed them, broke the seals upon them, handled the contents and resealed the boxes is, that the contents thereof, except for numbers on the ballots made by a numbering machine under Connery's supervision, were in the same condition at the trial as when received

and

After the removal of the boxes from the warehouse and
 Pilot boxes were sealed and the seals intact and the boxes delivered
 to employees of the Election Commission in the City Hall. The
 boxes were immediately transported, under guard, to various locations
 storage house, where they were stored in a locked vault. On October
 24, 1948, they were taken to the Election Commission's office
 in a vault and on that day turned over to James H. Connelley, assistant
 commissioner appointed by the city council. The boxes were taken to
 Connelley to a cabin in the Election Commission's office and found the
 seals were broken and an official receipt made by him. In accordance
 with the order appointing him. After the receipt Connelley retained
 the boxes, and delivered them back to the warehouse. On January 2,
 1949, the seals were again broken by employees of the Election
 Commission's office, apparently without any record of this.
 contents of the boxes sealed on a date in the office to which a
 handwriting expert to examine the boxes and witness to the fact that
 petition. Responses were not present in either container when the
 seals were broken, nor were the contents of the container by the
 expert, although Attorney Long, who sought to have returned the
 respondents at the initial hearing, signed with Connelley, the seal of
 a box which did not contain the ballot book in question. However,
 except for Long's signature on the seal of that box, and no respondents
 of the latter's presence at the hearing. Connelley and the trial court
 discussed calling Long as a witness but he was not called. He was
 concerned for the respondents of the examination of the ballots. Both
 copies of the boxes occurred out of court and out of the presence
 of the trial judge.

The testimony of the various persons who had custody of the
 boxes, removed them from the seals upon their opening the containers
 and opened the boxes is, that the seals were intact, intact for
 numbers on the ballot made up a handwritten number which Connelley
 supervised, was in the same position as the trial as when received

by the Election Commissioners; and that the contents of the boxes have not been tampered with, erased, altered or interfered with in anywise. Respondents contend that there was opportunity to tamper with the ballots and that the circumstances surrounding the ballot boxes and ballots after they came into possession of the Election Commissioners and until the trial, affects the integrity of the ballots as evidence; and, further, that no contest was pending and that the boxes were, therefore, illegally opened. The petitioner answers that the Supreme Court decided these contentions adversely to the respondents in Stockholm v. Daly, 374 Ill. 441. In the recent case of The People v. Ferro, et al, Opinion No. 41404, the Second Division of this Court characterized as "unsafe" the procedure or method employed here in recounting the ballots by a Special Commissioner outside the presence of the trial court. The court there also held that since Connery was ordered to examine the ballots on the recount and since the recount disclosed no erasures or alterations, then, because later an expert discovered erasures and alterations among the ballots counted, the inference was that there was tampering, and the integrity of the ballots as evidence was destroyed. In the case before us there is no record of a written order appointing Connery. He was directed orally by the court to "take them down to the Election Commissioners Office and recount them".

Connery testified that he did not believe that he made a memorandum of the condition of the ballots at the time of the count and had no recollection of any erasures on ballots. It is clear, however, that he personally counted as valid ^{those} ballots identified at the trial by the expert as having been erased.

At the election, out of which this proceeding arose, in addition to the judicial ballot, a separate proposition ballot was voted, one proposition concerning Oak Forest Infirmary and the other the Cook County Hospital. The vote for judges certified from the

by the Election Commission; and that the records of the County have not been tampered with, except, perhaps, in instances where the respondents contend that they had been tampered with by the County. Respondents contend that the Commission's report is correct with the ballots and that the Commission's report is correct with the boxes and ballots after they were into possession of the Election Commission and until the trial, whereas the integrity of the ballots as evidence; and, further, that no witness was present and that the boxes were, therefore, illegally opened. The Commission contends that the boxes were sealed before the trial and that the respondents in Joseph v. City, 174 Ill. 2d, 190, and in the case of People v. Kelly, 174 Ill. 2d, 190, the Commission's division of this Court characterized as "unreliable" the procedure of method employed here in recounting the ballots of a judicial election outside the presence of the trial court. The court there also said that since County was ordered to examine the ballots on the ground and since the recount disclosed no evidence of irregularities, then, because later in regard to discovery of errors and irregularities, the ballots counted, the recount was not done was tampered, and the integrity of the ballots as evidence was destroyed. In the case before us there is no record of a written order recounting County. It was directed orally by the court to "take them down to the Election Commission Office and recount them".

County testified that he did not believe that he made a memorandum of the condition of the ballots at the time of the count and had no recollection of any irregularities in the count. However, that he personally counted as valid ^{those} ballots submitted at the trial by the expert as having been opened.

At the election, out of which this proceeding arose, in addition to the judicial ballot, a separate proposition ballot was voted, the proposition concerning the State's Attorney and the State the Cook County Hospital. The vote the judges testified that the

16th precinct was, Straight Democratic 241, Straight Republican 7. No votes for individual candidates were certified as cast. The certified vote for propositions was Oak Forest Infirmary For 121, Against 42; Cook County Hospital For 122, Against 41. Connery's recount of the ballots cast in the precinct disclosed no discrepancy in the number of judicial ballots certified and a discrepancy of one vote in each of the propositions.

Seven Straight Republican ballots were certified from the precinct and appeared in the recount. The handwriting expert testified that in her opinion, based upon an examination of the ballots, erasures had been made of crosses on 32 Judicial ballots and that 29 of such erasures appeared in the Republican circle or Republican circles or squares. The expert testified to other findings which are not relevant to our review of the judgment. The record does not show a breakdown of the erased ballots into straight and split ballots, except for 6 ballots identified as having been erased in the Republican circle. Eleven persons testified that they voted the straight Republican ticket at the election, of these Osborn Ousley remembered that "Green and Mr. Kelly ran for office on June 5, 1939"; the testimony of the witness Jessie Parker as to how she voted is too vague for consideration; and Snowden "could not swear" that the signature on the application was his and his testimony of voting is not definite. Were it not for the fact that a majority of registered voters in Cook County do not vote in Judicial Elections, an inference might be justified that Snowden voted at the subject election. Two Judicial ballots appear to have been rejected as spoiled, but the record does not disclose whether or how they were marked. Several witnesses testified that they voted split tickets, but there is no evidence of any ballots having been marked in Democratic squares, nor was any evidence given by the expert that erasures had been made in Democratic squares, nor were any ballots counted or recounted for individual Democratic candidates. Also, of

those witnesses, Ethel Godfrey and Howard Zeh remembered that Judge Holland's name appeared on the ticket. It is conceded Judge Holland's name was not on the ballot. The witnesses Griffiths, Dunn, Priscilla Hills and Will Strong add nothing by their testimony to the determination of the issues in this case, and Rebecca Ousley's testimony is contradicted by her husband. There is no contention and no evidence that any of the Respondents erased or altered any ballots nor that they placed crosses on any ballots so erased or altered.

It is clear from the evidence that forgeries were committed. Several witnesses testified that the signatures purporting to be theirs on applications, were forgeries. There is no evidence that the forgeries were committed by the respondents. They deny that they committed forgery and they and Otto Rockman, a precinct captain who attended the count, deny that any forgeries were committed in their presence or with their permission, acquiescence or knowledge. There is no evidence that the respondents knew or should have known any of the persons whose names were forged and no witnesses who testified to forgery say that they knew the respondents. It is clear also that the name of Albert R. Miller, who died before the election, was forged to an application, but again there is no evidence connecting the respondents with the forgery, nor again is there any evidence that the respondents knew Albert Miller and there is the same testimony of, and in support of, respondents' denials of any wrongdoing or knowledge thereof. There was evidence introduced to prove other irregularities, but no finding in the order was based thereon and we shall not consider that evidence.

A summary of the evidence to sustain the finding with relation to erasures and alterations in the contempt order shows the reliable testimony of 8 witnesses who cast straight Republican ballots, 2 split ballots, with no evidence as to whether or how they were marked and the certification of 7 Straight Republican ballots; apparently reliable testimony of the voting of 5 split ballots, plus the testimony of the expert of an indefinite number of erasures in Republican squares

from witnesses, that they and others had observed that the
William's name appeared on the list. It is further stated that
name was not on the list. The witness further states that
William and Bill Brown had nothing to do with the list. The
list of the names in this case, and indeed, the list of the
contradicted by her husband. There is no contradiction and no evidence
that any of the witnesses stated or alleged any evidence was shown
they placed evidence on any list as an answer to the list.

It is also from the evidence that witnesses were contacted.
Several witnesses testified that the list of names appearing to be
there on the list, were forgotten. There is no evidence that
the list was compiled by the witnesses. They only said that
committed forgery and they and the witness, a person called in the
attended the court, that any forgery was committed in their
presence or with their assistance, knowledge or approval. They
is no evidence that the respondents knew or should have known any of
the persons whose names were forged and no witness was testified to
forgery say that they knew the respondents. It is also stated that the
name of Albert J. Miller, who died before the list, was forged in
an application, but again there is no evidence connecting the respondents
with the forgery, nor is there any evidence that the respondents
knew Albert Miller and that is the same thing, it is the same
of, respondents, denies it any knowledge or knowledge of the list.
was evidence introduced to prove other individuals, but no finding
in the order was based thereon and it shall not constitute that evidence
a summary of the evidence to sustain the allegations made.
to examine and investigate in the evidence which was available
testimony of 2 witnesses who said that they had a list, a list
Miller, with no evidence as to whether or not they were correct and
The certificate of 2 witnesses who said that they were correct and
will be testimony of the value of a will which, after the testimony
of the expert of an individual number of witnesses in individual reports

and the absence of any votes counted for individual Democratic judges on the recount, and the absence of testimony of any erasures in Democratic squares. To sustain the finding based on the forgeries, there is the reliable testimony of forgeries, without a showing that the respondents knew or should have known the persons whose names were forged and no testimony that such persons knew the respondents. Against this are the denials of the respondents supported by another witness of any of the charges against them; the absence of the testimony of the duly credentialed watchers who observed the post election canvass and count in the polling place; and the several witnesses to the good character of the respondents.

We believe from what we have pointed out hereinabove that the evidence justifies no finding that the respondents knowingly, fraudulently and unlawfully permitted or acquiesced in permitting the commission of the unlawful acts recited in the order. On the basis of this evidence, the trial court to justify the order entered, was required to infer that the respondents knowingly permitted or acquiesced in permitting the various unlawful acts in connection with which they were found guilty and to infer that they falsified the count and the certificate of the count. This court has announced often the requirement of the proof necessary to sustain a contempt order of this kind.

In the case of People, ex rel Ruach v. Wojcik, et al.,

Opinion No. 39351, this court said:

"While * * * it is not necessary to establish the guilt of respondent beyond all reasonable doubt, it has been held in such a case the petitioner is required to produce 'most convincing evidence of the truth of the charge.'"

Remarks of Justice Watchett in that case referring to the required proof are applicable here,

"This is more particularly true when a judgment so severe as this is entered. The effect of the judgment is to deprive respondents of their liberty and humiliate them to an extreme degree, and such punishment is not to be inflicted upon uncertain and doubtful evidence."

Petitioner contends and we agree that this court held in People, ex rel Rusch v. Garbacz, et al., No. 41536 and People, ex rel Greenzeit, 277 Ill. App. 479, that proof need not be made that the respondents themselves committed the election offenses charged, and that Chapter 46, Par. 186 Ill. Rev. Stats. authorizes the County Judges to punish Election Officials for contempt for misbehavior and gross carelessness in the performance of their duties. The proof nevertheless to justify such punishment must meet the requirements of the rule in this State and there must be a finding of such misconduct or gross carelessness based on sufficient evidence. In the Greenzeit case, the discrepancies appearing between the respondents' tally and that on recount ranged from 5 to 42 votes and this court said the trial court was justified in finding that/^arespondent there knowingly, etc. made a false canvass and return and approved the judgment sentencing that respondent to 60 days in the County Jail and imposing fines of \$150.00 and costs on others. In the Garbacz case, where 29 witnesses recorded as voting, testified that they did not, this court reversed the judgment and directed the trial court to reduce respondent's punishment from 2 years to 90 days. We have examined at petitioner's request the case of The People, ex rel Rusch v. Montesano, et al., 293 Ill. App. 630, but do not find a similarity between the circumstances there and here. This court held that the Garbacz and Greenzeit cases were proper cases in which to punish the respondents for gross carelessness in the performance of duties. In the case at bar we must determine whether the judgment of the trial court is contrary to the manifest weight of the evidence. Our inquiry is limited to the judgment order, its findings and the evidence in support thereof. There was no evidence that the respondents did the unlawful acts found to have been committed. The evidence or legal inferences therefrom

[illegible]

Justify no finding that they knowingly permitted or acquiesced in permitting the commission of the several unlawful acts charged. Counsel for The People argue that evidence of failure to examine and count the ballots by tens, in the manner required by law, and the ballots, tally sheets, application sheets and other exhibits establish misconduct and misbehavior on the part of the respondents. We have considered hereinbefore the question pertaining to the exhibits. The judgment order does not find that the respondents were guilty of sorting and counting the ballots in a manner which violated the law, but finds that they were guilty of knowingly permitting or acquiesced in permitting the several unlawful acts recited and then finds, by reason thereof, the respondents guilty of misbehavior and contempt. The latter finding rests upon the specific prior findings and, consequently, cannot stand if they do not. Whether the respondents were guilty of misconduct other than that of which they were found guilty, is not before us.

For the reasons herein given the judgment of the County Court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

BURKE, P.J. AND REBEL, J. CONCUR.

justify no finding that they knowingly permitted to be received in
permitting the collection of the several unlawful contributions.
General for the people upon that evidence of intent to receive and
count the money by him, in the manner described by him, and the
deliberate, fully aware, application thereof and their explicit intention
misconduct and misbehavior on the part of the respondents, it may
consider heretofore the question pertaining to the verdict.
The judgment order does not find that the respondents were guilty
of receiving and counting the money in a manner which violated the law
but finds that they were guilty of knowingly receiving or harboring
in violating the several unlawful acts testified and shown to be
reason thereof, the respondents guilty of conspiracy and assistance.
The latter finding rests upon the specific facts therein set
out, and, consequently, cannot stand if they be not. Under the facts
were guilty of misconduct other than that of which they were found
guilty, is not before us.
On the record herein given the judgment of the court
Court is reversed and the cause remanded.
JUDGMENT REVERSED AND CAUSE REMANDED.

WHEEL, T. J. AND WHEEL, J. WHEEL.

42035

316 I.A. 373³

R. M. KANIK,
Appellee,
v.

APPEAL FROM

JOHNSON BROTHERS HEATING CO., a
corporation,
Appellant.

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order of June 24, 1941, dismissing in the trial court its appeal from a money judgment for plaintiff entered March 31, 1941.

Notice of appeal from that judgment was filed April 16, 1941. Appeal bond and praecipe were duly filed and the latter specified the report of the proceedings. June 2, 1941, the time to submit said report to the trial judge was extended by stipulation to June 20, 1941 and on that date a further extension was ordered over plaintiff's objection, to June 24, 1941. The defendant tendered the report to the trial judge on June 24, but plaintiff's motion to dismiss the appeal was thereupon sustained. The trial court found in its dismissal order that the extension order of June 20 was a nullity, having been entered without jurisdiction.

Our decision involves a construction of Rule 36, Section I of the Supreme Court Rules pertaining to the power of the trial court to extend the time for submitting reports of proceedings. Supreme Court Rule 36 provides a fifty day period after notice of appeal within which to submit the report, and the rule in effect on June 20, 1941, provided that a trial judge may make "an order or orders" extending the time; that the application for any such "order" must be made before the expiration of the original period (fifty days) for submitting reports; that "the extension of time" shall not exceed a period of forty-five days from the last day of the fifty, and that further extensions shall be granted only by the reviewing court.

10000

J. N. Kline

Appeals

RECEIVED
JULY 10 1941
U. S. DISTRICT COURT
SOUTHERD DISTRICT
OF NEW YORK

RE. JUDITH KLINE vs. JAMES KLINE
Defendant answers from an order of June 14, 1941, filed
relating in the trial court the answer from a writ of habeas corpus
plaintiff entered March 21, 1941.

Notice of appeal from said judgment was filed April 16,
1941, against said and execution was duly filed and the latter
applied the writ of the writ of habeas corpus. June 7, 1941, the time
to submit said report to the trial judge was extended by adjournment
to June 20, 1941 and on that date a further adjournment was ordered
over defendant's objection to June 27, 1941. The defendant
contested the report to the trial judge on June 27, but plaintiff's
motion to dismiss the report was denied. The trial
court found in the defendant's favor and the execution order of
June 20 was a nullity, having been entered without jurisdiction.
The defendant desires a reconsideration of June 20, motion 1

of the district court which pertains to the power of the trial
court to extend the time for submitting answers to questions.
Whereas Court Rule 38 provides a writ of habeas corpus motion to
extend within which to submit the answer, and the rule is applied
on June 20, 1941, answered that a trial judge may make an order
or orders extending the time; that the application for an order
"order" may be made before the expiration of the original period
(fifty days) for submitting answers; that the extension of time
shall not extend a period of more than thirty days from the last day
of the fifty, and that further extensions shall be granted only
by the reviewing court.

Trial court and plaintiff construed that rule to limit the trial judge to a single extension, though it may expire within the forty-five days. Effective November 25, 1941, Rule 36, Section 1, provides that any trial judge may make "an order or orders" extending the time; that application for "any such order" must be made before the expiration of the original or extended period; that the extensions of time shall not exceed in the aggregate a period of forty-five days from the last day of the original period; and that the reviewing court shall grant further extensions.

It is evident that the language of the rule on this point, in force June 20, 1941, was ambiguous. It is also evident that the rule was amended, effective November 25, 1941, for the sole purpose of curing the ambiguity. The intention of the Supreme Court, ambiguously stated in the original rule, can be correctly determined in the light of the clearer expression of that intention in the rule, as amended. We believe the intention of the rule is now as it was before, to give the trial judge the power to enter as many orders of extension as may be necessary to do justice, so long as the trial is within the original fifty days, and so long as the total extensions granted do not exceed forty-five days after the last day of the original fifty. We believe this decision conforms to the liberal spirit of the Civil Practice Act. We, accordingly, hold that the order of dismissal was erroneously entered and it is hereby reversed, with directions to the trial court to sign and certify and permit the filing of a report of proceedings in case No. 41 S 9772.

ORDER REVERSED WITH DIRECTIONS.

BURKE, P.J. AND REBEL, J. CONCUR.

